Supreme Court, U.S.
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NO. _____

THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1993

NELSON A. FERNANDES PETITIONER

V.

ROCKAWAY TOWNSHIP TOWN COUNCIL & TOWNSHIP ENGINEER RESPONDENT

PETITION FOR WRIT OF CERTIORARI

NELSON A. FERNANDES

9 FOX RUN

DENVILLE, N.J. 07834

(UNASSISTED PRO-SE)

THE QUESTIONS FOR REVIEW

1. Was the petitioner denied due process in the primary sense by the erroneous application of the statute of limitations, among other errors.

2. Did the EPA violate federal statutes and regulations by imposing a grant condition that bars owners of lots with wetlands from connecting to the federally funded plant.

3. Did the RVRSA and Rockaway Township violate **42 U.S.C. 2000d** and state laws by accepting a grant condition that denies owners of lots with ESA's a connection to a sewer system funded with federal funds and assessments.

4. Does an ordinance or valid federal restriction meet the criteria of being **"restricted pursuant to law"** in **N.J.S.A. 40A:12-13** to prevent the sale of a lot.

5. Can the Supreme Court review the violation of federal law and regulations based on public documents in order to provide guidance for the state courts, though the matter may require a remand for a trial of the factual issues.

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GROUNDS FOR JURISDICTION

The Supreme Court of New Jersey denied a motion for reconsideration filed on MAY 13, 1993.

The Supreme Court of New Jersey denied a petition for Certification filed on MARCH 17, 1993.

The Appellate Court of New Jersey filed their affirmation of the lower court judgment on JAN. 22, 1993, which affirmation includes their opinion on the matter. The case was not to be published.

This Court's jurisdiction is invoked pursuant to **28 U.S.C. § 1257(3).**

The lower court erroneously dismissed a **42 U.S.C. §1983** civil rights complaint for failure to file a timely complaint, giving this Court jurisdiction in accordance with Mc Laughlin v. Fowler, Cal.1880, 14 S.Ct. 1192,154 U.S. 663, 26 L.ed. 176. The lower court also dismissed state law issues by applying an incorrect statute of limitations as a result of the civil rights action. The Appellate Court found there was no violation of **N.J.S.A. 40A:12-13,** which prejudices the petitioner upon remand.

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STATEMENT OF THE CASE

The RVRSA (Rockaway Valley Regional Sewer Authority), a quasi-public sewer authority composed of municipal members including the respondent, Rockaway Township, applied to the EPA for a grant to build a sewage treatment plant. The EPA agreed to provide the grant if the RVRSA would deny connection to the owners of vacant lots with ESA's (Environmentally Sensitive Areas) in the form of wetlands and floodplains for a period of fifty years. The RVRSA agreed to this condition in **Assistance I.D. # C340389-04** amend. **no. 1.**

40 CFR CH. I (7-1-88) §6.302 (a) requires that the EPA comply with **Executive Order 11990** for the protection of wetlands. **Executive Order 11990** as signed by Jimmy Carter requires "**each agency, to the extent permitted by law,** shall avoid undertaking or providing assistance for new construction located in wetlands." The EPA exceeded these limitations by imposing a grant condition that violates **40 CFR CH. I (7-1-88) Subpart F (e)** Civil Rights Act. "You must **comply with** section 602, Title VI of the **Civil Rights Act of 1964. (42 U.S.C. 2000d)**, and related nondiscrimination laws and Executive Order 11246. "**These authorities prohibit you from excluding any person from participating in, denying them the benefits of U.S.C.**

2000D." The RVRSA and respondent agreed to violate this federal statute by accepting the grant condition.

The EPA required the RVRSA hold a public meeting to notify the affected owners of the loss of this vested property right that would prevent the development of their land. The municipal members of the RVRSA, more specifically Rockaway Township, attended this meeting and subsequently instituted land use ordinance **§54-100 L.** which denies connection to the owners of lots affected by ESA's. This ordinance violates **42 U.S.C. 2000d**, as well as **N.J.S.A. 40:48-2**, which states "Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws **not contrary to the laws of this state or of the United States."** Their action is also contrary to state case law which prohibits municipalities from dealing with issues that requires uniform statewide treatment. The municipal denial was based on maps and a list of affected lots generated for the public hearing. During this hearing they informed the affected owners of the loss of a vested property interest, which prevents development and represents a practical . . confiscation.

The procedure followed after the plant opened began with the Township's denying the right to connect to the sewer lateral without mention of the land use ordinance

passed in support of the grant condition. The procedure to appeal that denial required a resolution from the Township approving the construction before the RVRSA would review the application. Initially, the Township refused this resolution, which resulted in a year and a half of effort before they would grant it. When approved, the resolution was forwarded to the RVRSA, who approved and forwarded the application to the NJDEP (New Jersey Department of Environmental Protection). They openly stated that their policy was to reject these applications. They then forwarded the application to the EPA, who also stated that it was their policy to reject the application. Consequently, this appeal procedure was a sham that provided the appearance of an appeal mechanism. It layered one public agency on another, exhausting the applicant from further pursuing his rights after being rejected on so many levels. The appearance of being supported on every official level concealed the EPA's violation of federal statute and regulation. Anyone reaching the EPA was met by a number of attorneys, which precludes the thought of their having violated federal statute and regulations. Of the 320 lots affected by the EPA grant Condition within the scope of the RVRSA, it appears none have challenged this arbitrary contractual condition.

Rockaway Township profits from this situation by denying access to the sewer and when the lot reverts to them for nonpayment of taxes, they conceal the existence of the EPA Grant Condition and their land use ordinance in order to sell affected lots at public auction with a starting bid. They continue to profit by taxing an otherwise useless lot. This may lead to reselling these lots to others by those originally injured, which further increases the circle of injury, as a result of the municipality's initial conduct. Rockaway also sells tax sale certificates on affected lots to profit from that avenue after an owner gives up. The statute that authorizes the sale of lots no longer needed for public use by the municipality, **N.J.S.A. 40A:12-13**, has a prohibition against selling lots that are **"dedicated or restricted pursuant to law"** and that "**Such restrictions or conditions shall be related to a lawful public purpose**."

The petitioner purchased a lot owned by Rockaway Township as the result of being the successful bidder at a public auction. This lot was affected by the Grant Condition. He also purchased the adjacent lot, which required purchasing a tax sale certificate. This lot was likewise affected, providing grounds for a refund based on **N.J.S.A. 54:5-43.** Rockaway Township also misrepresented both lots as being able to connect to the sewer system. Rockaway

Township subsequently approved the subdivision of these adjoining lots though contrary to statute due to the grant condition. Shortly afterwards, they refused to provide building permits as a result of the grant condition. It should be noted that Rockaway Township provided successful bidders with a covenant in the resolution and deed as part of the contract. That covenant says they had done nothing to affect the lot sold, by force of statute **N.J.S.A. 46:4-6.** Their approval of the EPA grant condition and passage of a land use ordinance violates this covenant.

Prior to building the sewage treatment plant, the municipal members of the RVRSA had a ban against new construction for many years, unless the lot could support a septic system. Therefore, lots that could be developed in this fashion had already done so. Consequently, wetland lots, as well as those with other logistical problems, needed a sewer connection to make construction feasible. The EPA grant condition effectively prevents development by denying access to the benefit of a federally funded sewer treatment plant. The EPA knew the result . . . **confiscation**.

I submit to this Court that the EPA's conduct represents a new approach to violating constitutional rights. This is achieved by requiring recipients of grants to deny owners the right to connect to a federally funded

improvement, thus preventing development and effectuating a practical confiscation. The EPA compelled acceptance of this violative condition by recipients or be refused funding. Even their administrative agency review is aimed at reaffirming the denial until the applicant is frustrated into submission by a costly and time consuming process. It serves as a design for future forays. I trust the mechanism used will be of interest to this Court if the issue of violating the property rights of individuals is not significant in comparison to other issues presented to this noble tribunal.

CASE PRESENTED TO THE COURT

The petitioner filed a **42 U.S.C. 1983** civil rights action against Rockaway Township in the Law Division of the Superior Court of New Jersey. The complaint included issues of fraud, breach of contract, warranty and violations of state statute. The petitioner moved before the court of first instance for a finding that the defendant had violated **N.J.S.A. 40A:12-13,** a state statute, by selling a lot affected by an EPA grant condition. The petitioner did not present the court with its civil rights violation, since the statutory violation appeared very clear and could be disposed on motion. The respondent moved for a dismissal based on failure to file a timely tort claim. The court dismissed the state law issues on the grounds that petitioner failed to file a timely tort claim and on findings that there was no fraud. The court also disregarded the engineer's misstatement of a material fact. Ever since Judge Harper rendered that finding, the petitioner has been subjected to further findings couched on that initial decision.

The court's oral findings are presented in applicable arguments to establish a proper context for review.

Argument 1 presents an overview of the petitioner's original case and the Appellate dismissal, which has since

been expanded to include another violation of federal law as a result of the Appellate Court findings.

Arguments 2 & 3 review the additional violation of federal and state law.

Arguments 4 - 11 deals with the errors of the court below and the Appellate Court.

Argument 12 outlines the confiscation of rights that violates the 14 th. Amendment amounting to a **"taking"** and the result of that violation became the basis for the resolution for public sale.

Not being an attorney, the petitioner has wrestled with the approach to presenting these issues, starting with a complex initial violation and followed by a number of errors that have denied the petitioner a trial and resulted in uncovering one more violation that started this scenario. I pray the approach taken is clear, concise and presents the issues in a manner acceptable for this Court's consideration.

ARGUMENT 1

APPELLATE COURT RULED ON THE FEDERAL ISSUE

The Appellate Court considered this case dismissed for failing to file a timely tort claim and for filing a civil rights action beyond the statute of limitations, but also held:

> ***"While there may be reasons to suggest that a municipality should generally advise prospective purchasers of a known sewer ban relating to property to be sold at public auction, this is a matter for legislative policy, and we are referred to no authority in statute or case law so holding. We reject plaintiff's argument that N.J.S.A. 40A:12-13 barred the sale as "restricted pursuant to law.""***

The petitioner contends the EPA Grant Condition was a valid federal restriction in accordance with the following :

> ***"Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review to determine whether he has exceeded his statutory authority or acted arbitrarily."*** United States v. Shimer, 367 U.S. 374, 381-382 (1961).

Rockaway Township violated **N.J.S.A. 40A:12-13**, the statute that authorizes public sale but prohibits the sale of lots **"restricted pursuant to law"**, by selling a lot with a valid preemptive federal restriction. This statute creates a

property interest subject to protection by the 14th. Amendment based on the following :

> ***"Liberty and property interests protected under Fourteenth Amendment may be created by state law; minimum procedures necessary to protect such interests, however, are determined as a matter of federal constitutional law without deference to any procedural preferences expressed by state legislature or state courts. U.S.C.A. Const. Amend. 14."*** See, Holman v. Hilton, 542 F.Supp. 913, affirmed 712 F.2d. 854. Rowe v. Fauver, 533 F.Supp. 1239; Wolff v. McDonnell, 418 U.S. 539, 557-558, 94 S.Ct 2963, 2975, 41 L.Ed.2d 935 (1974); Winsett v. McGinnes, 617 F.2d 996, 1005 (3rd.Cir. 1980).

N.J.S.A. 40A:12-13 creates a "vested right", and the Fourteenth Amendment secures it against invasion. Thus, to sell lots diminished by legislative action which amounts to a taking offends the 14 th. Amendment and this statute. Pennsylvannia Greyhound Lines, Inc. v. Rosenthal, 14 N.J. at 384 (1954) defined vested rights as follows:

> ***"the concept it expresses is that of a present fixed interest which in right reason and natural justice should be protected against arbitrary state action--an innately just and imperative right that an enlightened free society, sensitive to inherent and irrefragable individual rights, cannot deny. Such seems to be the principle of*** Campbell v. Holt, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483 (1885). ***"***

Rowe v. Fauver, supra., also held that the test of a state created liberty is whether the state law creates "justifiable

expectation" that "the liberty will not be infringed except upon the occurrence of specified events". Helms v. Hewitt, 655 F.2d 487, 493 (3d.Cir.1981); see also Vitek v. Jones, 445 U.S. 480, 489, 100 S.Ct.1254, 1261, 63 L.Ed.2d 552 (1980). That expectation is established by prohibiting government from selling lots **"restricted pursuant to law".** Rowe v. Fauver, supra., further concluded:

> ***"Guidance in construing the state law may be obtained not only from the plain language of the statute but also from authoritative interpretations by state court."***

Ferreira v. City of Asbury Park, 237 N.J. Super. 142, (App.Div.1989) provides that guidance with the following:

> ***"the municipality may sell any such property, "other than . . . real property otherwise dedicated or restricted pursuant to law." In this context, we conclude that the phrase "real property otherwise dedicated or restricted pursuant to law" in N.J.S.A. 40A:12-13 means real property otherwise dedicated or restricted pursuant to a statute, not by deed language."***

The following federal holding expresses the same view as the preceding finding and the statute:

> ***"Property which is held by these corporations upon conditions or terms in a grant and for a special use, may not be diverted by the legislature."*** Worchester v. Street Railway Co., 196 U.S. at 551, 1904

The courts are then bound to interpret the statutory wording

of **"restricted pursuant law"**, which is found to mean **"restricted pursuant to statute"** in accordance with:

> ***"to be given the generally accepted meaning unless the contrary intent is clear."*** Grogran v. DeSapio, 11 N.J. 308 (1953); U.S. v. Champlin Ref. Co., 341 U.S. 290, 297, 71 S.Ct. 715, 95 L.Ed. 949, 955 (1951).

The federal restriction clearly meets the criteria in **N.J.S.A. 40A:12-13,** so the respondent's violation requires the contract be rescinded based on the following::

> ***"If it clearly appears that a contract has as its direct object and purpose a violation of the Federal and state constitution. Federal or state statutes, some ordinance of a city or town, or some rule of the common law courts will not lend their aid to its enforcement."*** Zeitz v. Foley, 264 S.W. 2d 267 (Ky.Ct.App.1954); cited in Naseef v. Cord. Inc. 90 N.J. Super.135, 142 (A.D.1966)

The Supreme Court in the case of City of St. Louis v. Praprotnik, 485 U.S. 112, 108 S.Ct. 915 (1988) concluded that municipalities may be sued directly if a government body is alleged to have caused a constitutional tort through policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers. The Council's passage of a resolution to sell a lot they knew to be affected by a federal restriction which amounts to a violation of a state statute represents a § **1983** violation. Furthermore, the sale of a lot so diminished in rights that it

is offensive to the 14 th. Amendment also violates the state statute. And upon selling the lot, Rockaway Township violated the petitioner's rights.

The Appellate Court's finding disregards the federal authority to impose the restriction, on one hand, and fails to recognize the right to be free of that restriction on the other. In an effort to establish the EPA's statutory authority to impose the Grant Condition, the petitioner has discovered that the EPA violated its authority, while the RVRSA and the respondent violated another federal statute. Consequently, the respondent's violation of the petitioner's civil rights remains unchanged, except that it begins with yet another violation of constitutional law. That violation is reviewed in the next two arguments.

The Appellate Court affirmed the lower court dismissal, then made further findings contrary to the following:

> ***"Such a base for decisions effectively bars an excursion by this appellate tribunal into the realm of independent fact findings."*** Sandler v. Lawn-A-Mat Chem & Equip. Corp., 141 N.J.Super. 437 (A.D. 1976).

The court below and the Appellate Court failed to realize that the sale of the lot represented the culmination of Rockaway's violation, which started with the passage of the resolution containing wording to impose the federal

restriction on a buyer. The courts view this condition as binding, when in actuality it is evidence of their fraud.

The Appellate Court's erroneous finding that the petitioner failed to file a timely complaint and that the respondent did not violate **N.J.S.A. 40A:12-13**, which creates federal property interest, provides the Supreme Court with jurisdiction based on *Super Tire Eng. Co. v. McCorkle*, C.A.N.J. 1977, 550 F.2d 903, certiorari denied 98 S.Ct. 106, 434 U.S. 827, 54 L.Ed.2d 86, rehearing denied 98 S.Ct. 753, 434 U.S. 1025, 54 L.Ed.2d 773.

ARGUMENT 2

THE EPA & RECIPIENTS OF GRANTS ARE REQUIRED BY REGULATION AND STATUTE NOT TO DENY ANY PERSON THE BENEFITS OF A PROGRAM

The EPA and recipients of grants are subject to **40 CFR**, dated 7/1/85, which contains the same provision as in the current regulation, § **30.600 (e) Civil Rights Act** which **requires compliance with 42 U.S.C 2000d by preventing the exclusion of any person from participating in, denying them the benefits of**, or discriminating against them on the basis of race, color, or national origin under any program or activity involving Federal financial assistance.

The EPA required that the respondent violate this regulation and statute based on authority derived from **40 CFR Ch. I (7-1-85 Edition)** § **35.925-13**, a regulation that is repugnant to **42 U.S.C. 2000d** based on the following finding::

> ***"The meaning of a statute, clear and unambiguous on its face, may not be varied by administrative decisions."*** *Verbeem v. U.S.* D.C. Mich.1957, 154 F.Supp. 431, affirmed 78 S.Ct. 1006, 356 U.S. 676, 2 L.Ed. 1072.

It would appear that the sewer hookup restriction in § **35.925-13** was targeted for the lands owned by the signers of the agreement, not the public, which would be in keeping with the following Supreme Court holding:

> ***"Property which is held by these corporations upon conditions or terms in a grant and for a special use, may not be diverted by the legislature."*** Worchester v. Street Railway Co., 196 U.S. at 551, 1904

Otherwise, the application of this regulation to land serves to deny its owner a right, contrary to the following holding:

> ***"The benefits of the affirmative duty placed on federal funding agencies, created by § 2000d, inure to all persons whose rights to equal treatment are enhanced by the positive efforts of the government."*** Young v. Pierce, 544 F.Supp. 1010 (1982)

The following holding makes it clear that everyone is entitled to the benefits of such a program:

> ***"The Supreme Court has declared that the Civil Rights Acts evince a congressional intention to define standing as broadly as is permitted by Article III of the Constitution."*** Trafficante v. Metropolitan Life Insurance Co., 409 U.S. 205, 93 S.Ct. 364, 34 L.Ed.2d. 415 (1972). See also Hackett v. McGuire, 445 F.2d. 442 (3d. Cir. 1971).

The EPA Grant Condition further transgresses the following holding from Coppage v. Kansas, 236 U.S. 1, 19:

> ***"the Fourteenth Amendment debars the States from striking down personal liberty or property rights, or materially restricting their normal exercise, excepting so far as may be incidentally necessary for the accomplishment of some other and paramount object,***

and one that concerns the public welfare. The mere restriction of liberty or of property rights cannot of itself be denominated "public welfare" and treated as a legitimate object of the police power; for such restriction is the very thing that is inhibited by the Amendment." (Emphasis Added)

Executive Order 11990 calls for the preservation of wetlands from new construction. By listing the lots that meet this criteria and prohibiting their connection to a sewer, it fulfills its mandate specifically, not incidentally. It also denies the owner a right protected by statute as the object of the police power. It effectively confiscates private property by taking "vested" rights.. The principle of estoppel is appropriate here, since municipalities throughout this state require that homes connected to a septic system be connected to a central sewer system when made available. Taking the reverse position is merely a justification for taking private property.

The RVRSA violated federal law and regulations by accepting the grant condition, which is contrary to **42 U.S.C. 2000d**. and **40 CFR CH. I (7-1-88) Subpart F.** Furthermore, the RVRSA's members established land use ordinances in support of a condition that violates state law. The federal violation is supported by the following:

"Liberty interests entitled to protection under Fourteenth Amendment may be created by

administrative regulations. U.S.C.A. Const.Amend. 14." See, King v. Hilton, 525 F.Supp. 1192.

"Federal regulations have no less pre-emptive effect than federal statutes. Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review to determine whether he has exceeded his statutory authority or acted arbitrarily." United States v. Shimer, 367 U.S. 374, 381-382 (1961).

The grant condition imposed by the EPA (**Assistance I.D. No. C340389-04 amendment no. 1)** contravenes **40 CFR § 30.600 (e), 40 CFR CH. I (7-1-88) Subpart F., Executive Order 11990,** and **42 U.S.C 2000d** by denying the owner of a lot affected by the grant condition access to the sewer treatment plant built with federal funds and local tax assessments. The EPA, RVRSA and its member communitys' agreement to violate this federal statute is clearly contained in the above referenced amendment. Therefore, Rockaway's initial violation begins here.

ARGUMENT 3

ROCKAWAY TOWNSHIP VIOLATED ITS GRANT OF POLICE POWER AND POWER TO CONTRACT

Rockaway Township passed §54-100 L, a land use ordinance which prohibits connection of wetland lots to the sewer treatment plant. It did so in support of a contractual condition which contravenes a federal statute. Rockaway's legislative act was required by the following holding:

> ***"A municipality cannot act as an individual does: it must proceed in conformity with statute or, in the absence of statute, with the common law, by ordinance, or resolution or by motion: this is especially true with respect to real estate."*** *Skowysz v. City of Ventnor*, 110 N.J. Super. 340, 265 A.2d. 554 (1970).

However, the passage of this ordinance, as well as their approval of the grant condition as a member of the RVRSA, not to mention the RVRSA's acceptance of the grant condition, was beyond their power to contract and their police powers based on the following holdings:

> ***"The grant of police power "relates to matters of local concern which may be determined to be necessary and proper for the good and welfare of local inhabitants, and not to those matters involving state policy or in the realm of affairs of general public interest and applicability.""*** *Wagner v. Mayor and*

Municipal Council of City of Newark, 24 N.J. 467, 478 (1957).

"Hence the municipality may not legislate upon an aspect of a subject "inherently in need of uniform treatment." *In re Public Service Electric and Gas Co.*, 35 N.J. 358, 371 (1961).

The case of *Mount Pleasant v. Beckwith*, 100 U.S. 514, held that where no constitutional restriction is imposed, the corporate existence and powers of counties, cities and towns are subject to the legislated control of the State creating them. The N.J. courts have restricted municipal power to exclude the passage of ordinances on matters of general public interest.

Executive Order 11990 as signed by Jimmy Carter on 5/24/77, provides in part, **Section 2. (a)**:

"each agency, to the extent permitted by law, shall avoid undertaking or providing assistance for new construction located in wetlands."

This order makes wetlands a national issue for the EPA, which precludes Rockaway Township from dealing with a subject in need of uniform treatment. Furthermore, the passage of the ordinance denies the affected owners a federal right protected by **42 U.S.C. 2000d.** Therefore, the violation of this statute also violates **N.J.S.A. 40:48-2**:

"Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and

by-laws not contrary to the laws of this state or of the United States."

Consequently, this ordinance should be repealed in accordance with the following holding:

"Hence an ordinance will fall if it permits what a statute expressly forbids or forbids what a statute expressly authorizes." Summer v. Teaneck, 53 N.J. 548 (1969)

This ordinance further violates **section (a)** of **N.J.S.A. 40A:12-13**, by violating the 14 th. Amendment:

"Such restrictions or conditions shall be related to a lawful public purpose"

40 CFR Ch. I § 35.925-13 has resulted in the RVRSA and its member communities violating their grant of power and the rights of its citizens as protected by **42 U.S.C. § 2000d.** Thus the EPA violated the following holding:

"HUD sanctioned the violation of plaintiff's rights and was an active participant since it could have halted the discrimination at any step of the program. Consequently, it's own discriminatory conduct . . . . is violative of 42 U.S.C. § 2000d." Hicks v. Weaver, 302 F.Supp. 619 (E.D.La.1969)

ARGUMENT 4

THE APPELLATE COURT ERRED BY SUBJECTING STATE LAW ISSUES TO THE NOTICE PROVISIONS OF TORT CLAIMS ACT

To begin with, Judge Harper dismissed the state law issues for failure to file a timely tort claim, as evinced by his oral findings at the motion hearing of April 5, 1991:

> ***"Because I'm really troubled as to how you should be able to litigate this now after not following the tort claims procedure. I'm not talking now at this point on 1983 claims, but I'm talking about basically the other claims in the case that you have against the town."*** (T17-20)

> ***"You're asserting a tort claim as I see it and, and it's a claim very frankly that I think is, is barred, it's time barred, because you didn't give the requisite notice within the ninety day period. That notice came about five years after the sale,"*** (T27-10)

> ***"as far as anything that has to do with fraud, he's he's time barred."*** (T30,6-8)

> ***"I think as a matter of law you're time barred anyway. Because of the nature of what you have. I think this, this transaction is something that is not subject to being a matter of suit unless you give the requisite notice and you haven't."*** (T28, 17-22)

The Appellate Court affirmed Judge Harper's view with the following from their opinion:

"While plaintiff argues that "[t]he issue before the court is a breach of contract not a tort claim," and cites cases for the proposition" that contract issues are not subject to the Tort Claims Act," . . . . .To the extent plaintiff relies on the tort claims because of the personal injury aspect of the federal claims, see Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2D 254 (1985), no timely notice was given as required by statute. See N.J.S.A. 59:8-8, -9".

The Appellate Court held that breach of contract is not a tort, but applied the notice provision, since it was a §**1983** civil rights action. By so doing, they contravene the holding of *Reid v. City of New York*, 736 F.Supp. 21 (E.D.N.Y. 1990), which also involved a §**1983** action but held that pendent state claims are subject to the applicable state, not federal, limitations period.

The Appellate Court cites *Wilson v. Garcia, supra.*, which did not deal with pendent state claims and borrows the "most analogous" state statute of limitations. The case of *Atlantic City Hospital v. Finkle*, 110 N.J. Super. 435, 265 A.2d 853 (Co.1970) held that whether the six year statute on contracts or the two year statute on personal injury actions governs depends on nature of injury, not theory of recovery.

N.J.S.A. 40A:12-13, the statute that authorizes the sale of land, is violated by selling a lot that is **"restricted pursuant to law."** Consequently, the statutory restriction injures the land before this prohibition can prevent the sale,

and by proving such a restriction the sale of the lot could be stopped before it injures a buyer. If violated, it represents a state claim subject to a six year limitations period, while the passage of the resolution to knowingly sell such a lot constitutes a civil rights violation upon sale.

A breach of warranty in this case can only result from an injury to the land by the grantor, which also brings it under the six year limitations period in accordance with *Atlantic City Hospital v. Finkle*, supra.

As to the issue of fraud, the case of *Hill v. Middletown Bd. of Ed.*, 183 N.J. Super. 36 (A.D.1982) held :

> ***"Hence, even if there is no substantial compliance with the notice provisions of the Tort Claims Act, a public entity will be estopped from asserting this defense "where the interests of justice, morality and common fairness dictate that course.""***

It will be shown that the Appellate Court disregards case findings that show the respondent's concealment of the grant condition amounts to a fraud.

ARGUMENT 5

JUDGE RUSSELL DID NOT DISMISS THE CIVIL RIGHTS VIOLATION FOR FAILURE TO FILE WITHIN THE TWO YEAR LIMITATIONS PERIOD

Judge Russell made the following finding at the conclusion of oral argument at the October 25, 1991 motion hearing on the Township's motion that the petitioner had filed beyond the two year statute of limitations:

> ***"The statute of limitations argument I can't address here first so if it had been dispositive of the matter, I would have addressed it first and then we would have to go after that, but he maintains he didn't have this knowledge until 1989 so that might not dispose of things, okay?***
>
> ***So we can't look at it that way as being the threshold question so we move to the situation whether the sale is such that you have a actionable claim. This is an as-is sale, marketable title. As far as I can see from the papers before me, it's a marketable title. The effect of the EPA sewer ban connection did not make it an unmarketable title."*** (T77-9)

Judge Russell found the petitioner made late discovery of a cause of action and recognized a material issue of fact existed for trial when she said:

> ***"But he didn't know, he thought it came on after he got the property."***

Consequently, her dismissal of the civil rights claim based on "as is", a state law issue, is not an appropriate basis for dismissing a federal claim. The Appellate Court failed to see this and subsequently erred by stating that there was a dismissal based on the statute of limitations:

"The trial court concluded that plaintiff's federal civil rights claim pursuant to 42 U.S.C.A. § 1983 was barred by New Jersey's two year statute of limitations."

The Appellate Court may have been confused by Judge Russell's opinion on reconsideration, which refers to an amended complaint, not the one originally ruled on. The following excerpts are clear on this point:

"(3) plaintiff seeks leave to file an Amended Complaint."

"Moreover, even if plaintiff had stated a claim, from the facts as stated in the proposed Amended Complaint, all actions of which plaintiff complains occurred more than two years prior to the proposed Amended Complaint. Pursuant to Wilson v. Garcia, 105 S.Ct. 1938 (1985)"

The Appellate Court error and failure to catch Judge Russell's inappropriate dismissal required reversal and remand by the Supreme Court of N.J.

ARGUMENT 6

JUDGE RUSSELL'S FINDING OF BELATED DISCOVERY MUST APPLY TO ALL LIMITATIONS ISSUES

The petitioner was unaware that the Grant Condition went into effect in 1984, a year before the public auction. Beside concealing this fact, the Township also misrepresented the sewer lateral next to the property as the way to service both lots. Furthermore, the township engineer told the petitioner on December 2, 1986 that the Grant Condition went into effect recently, as evinced by the petitioner's affidavit. Township minutes show a councilman telling the petitioner in 1988 that the grant condition came after his purchase. The respondent has even admitted to concealing the grant condition. Lastly, a title search failed to uncover the grant condition. These facts were presented to Judge Russell in response to the respondent's motion to dismiss for failing to file a timely civil rights claim. They ended with the following from the transcript:

"* it was in November of '89 when the Township issued the stop work order.

The Court: ***up to this point, you still don't know about the EPA situation?***

Mr. Fernandez: ***No, when they issued the stop work order, I do not know. It was after the issuance of the stop work order which resulted in my checking***

into everything and it was then three factors that I had to pull together in order to ascertain what the Town had done. (T67-24)

The following finding by Judge Russell at that motion hearing shows that the court accepted the late November discovery of a cause of action (T77, 9-17):

"The statute of limitations argument I can't address here first so if it had been dispositive of the matter, I would have addressed it first and then we would have to go after that, but he maintains he didn't have this knowledge until 1989 so that might not dispose of things, okay?"

This finding accepts the date of belated discovery of a cause of action in accordance with the following holding:

"The rule therefore functions to modify the conventional statutory period but only to the extent of postponing the accrual of a cause of action until the plaintiff "learns, or reasonably should learn, the existence of that state of facts which may equate in law with a cause of action." Burd v. New Jersey Tel. Co., *supra.*, 76 N.J. at 291.

There can only be one date of late discovery for a cause of action from which the limitations period begins to run. Consequently, Judge Russell's finding displaces Judge Harper's earlier finding in accordance with **Rule 4:42-2** which states in part:

"any order or form of decision which adjudicates fewer than all the claims as to all the parties shall not terminate the action as to any of the claims, and it

shall be subject to revision at any time before the entry of final judgment in the sound discretion of the court in the interests of justice."

The case of *Johnson v. Cyklop Strapping Corp.*, 220 N.J.Super.250, 263-265 (App.Div.1987) held interlocutory orders are committed to the sound discretion of the court. There was an adequate factual basis in the summary judgment record of that case to support a finding that should have prevented partial summary judgment. In the matter, *sub judice,* the petitioner presented triable issues of material fact that were timely presented upon discovery.

Palma v. Powers, 295 F.Supp. 924 (1969) held:

"As noted earlier, issue preclusion generally applies only to those matters actually raised and adjudicated in an antecedent suit."

This federal finding shows Judge Harper's ruling was still subject to change when Judge Russell made a finding that altered it. It's also consistent with the previous Appellate finding and court rules. Consequently, the Supreme Court should have been compelled to reverse and remand in accordance with the following finding:

"A judgment entered by a court with jurisdiction of the subject matter and the parties is considered valid, even though erroneous or obtained by fraud. Until set aside in the court which rendered it or by a reviewing court exercising appellate jurisdiction, it is binding on the parties and their privies in all of the nation's

tribunals, federal or state." Palma v. Powers, 295 F.Supp. 924 (1969)

Judge Russell accepted late discovery as being in the latter part of Nov. of 1989 and the Tort Claim notice, if pertinent, was served on February 12, 1990, within ninety days. The petitioner's complaint was filed in December of 1990 and an amended complaint was filed on March 11, 1991, prior to the respondent's answer, all of which is well under two years. Even the amended complaint submitted to Judge Russell months before was timely on October 25, 1991, the date of the motion hearing. Therefore, there should have been no question as to the timeliness of the petitioner's claim and his right to a trial.

ARGUMENT 7

ROCKAWAY TOWNSHIP'S VIOLATION OF THE COVENANT AND N.J.S.A. 46:4-6

By passing municipal land use ordinance §54-100 L, Rockaway Township violated federal and state statutes, as outlined in earlier arguments. This legislative act, as well as their approval of the grant condition, violated the covenant in their resolution for public auction, which reads as follows:

> ***"f) All conveyances shall be by bargain and sale deed with covenants against grantor's act. No affidavit of title will be provided."***

The covenant, as it appears in the deed given to the petitioner, reads as follows:

> ***"Promises by Grantor. The Grantor promises that the Grantor has done no act to encumber the property. This promise is called a "covenant as to grantor's acts" (N.J.S.A. 46:4-6). This promise means that the Grantor has not allowed anyone to obtain any legal rights which affect the property (such as by making a mortgage or allowing a judgment to be entered against the Grantor).***

Rockaway's promise as the Grantor carries the force of **N.J.S.A. 46:4-6**, which reads as follows:

> ***"A covenant by the grantor in a deed "that he has done nothing to encumber the said lands", shall have the same effect as if he covenanted that he had not done or executed, or knowingly suffered to be done or***

executed, any act, deed or thing whereby the lands and premises conveyed, or intended so to be or any part thereof, are or will be changed, charged, altered, affected, defeated, or encumbered in title, estate or otherwise."

There is one finding that addresses the general scope of covenants, which held:

"A covenant against incumbrances, if broken at all, is broken the instant the deed is given." Old Falls, Inc. v. Johnson, 88 N.J. Super. 441, 450 (App. Div. 1965)

The respondent violates this covenant by passing an ordinance that was beyond their authority, then by passing a resolution to further benefit by sale and taxation, despite the knowledge that they would prevent the development of the lot as a result of their ordinance and the Grant Condition.

Rockaway Township's resolution for public sale also contained the following:

"2. That the said sale will be in accordance with N.J.S.A. 40A:12-13 et seq. and in accordance with the following terms and conditions:"

The lower court, Appellate and Supreme Courts of N.J. have failed to meet their obligation by not complying with the standard of review created by the following holding:

"A specific provision integrated into the contract by force of a statute, as a matter of public policy, "must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractor's understood it. Exactly the same result is

reached even though the parties know nothing of the statute and do not include the provision, and even though they know of it and expressly agree upon the exact contrary." Corbin on Contracts, section 551. See also *Baker v. Aetna Life Insurance Co.*, 264 N.Y. 150, 190 N.E. 327 (Ct. App. 1934); *Jones v. Preferred Accidental Insurance Co.*, 226 Wis. 423, 275 N.W. 897 (Sup.Ct. 1937); *Board of School Commissioners v. Hahn*, 246 Ala. 662, 22 So. 2d 91 (S. C. 1945).

The respondent's failure to address the petitioner's allegation of a statutory violation and Judge Harper's failure to consider the violation falls short of this review requirement. Considering the motion hearing was not a trial, the court's findings on the fraud issue were premature and disregarded the requested tolling of the limitations period based on the municipal concealment of a material fact. *French v. U.S. Fidelity & Guaranty Co., D.C.*, 88 F.Supp. 714 (1950)

ARGUMENT 8

THE APPELLATE COURT FAILS TO SEE THE FRAUD WHICH VITIATES AN "AS IS" CONTRACT

The Appellate Court stated the following in their opinion, which quotes in part from the resolution for sale:

> ***"Particularly given plaintiff's acknowledgment of the "auction information" indicating that the property was sold "as is," and acknowledging the "terms and conditions" of the sale as embodied in the governing resolution in which the Township expressly made "[n]o representations of any kind . . . as to the condition" of the property, and making the sale subject to "existing conditions, covenants and restrictions" of all relevant government entities including the United States of America and the Township, we see no basis for disturbing the judgment. R. 2:11-3(e)(1)(A),(E)."***

The Appellate Court finds that acceptance of the terms of sale and "as is" are reasons for not disturbing the dismissal, though the lower court's dismissal for failing to timely file prohibits further findings based on the holdings of *Sandler v. Lawn-A-Mat Chem & Equip. Corp.*, supra. Further findings only prejudice the petitioner on remand.

By avoiding the violation of the covenant, the court below and Appellate Court avoided a material issue of fact which represents a breach of warranty subject to a six year

limitations period. The court below also avoided the other statutory violation with the following response to the petitioner's query on **N.J.S.A. 40A:12-13**:

> ***"The Court: I'm saying that the manner in which they sold it appears to be consistent with law."***

The use of the word "appears" clearly shows the court was uncertain. The violation of these statutes represents material issues of fact in dispute that needed to be tried for a review in accordance with the following holding:

> ***"A specific provision integrated into the contract by force of a statute, as a matter of public policy, "must be interpreted and given effect in accordance with the intention of the legislature, irrespective of how the contractor's understood it."*** Corbin on Contracts, section 551. See also *Baker v. Aetna Life Insurance Co.*, 264 N.Y. 150, 190 N.E. 327 (Ct. App. 1934); *Jones v. Preferred Accidental Insurance Co.*, 226 Wis. 423, 275 N.W. 897 (Sup.Ct. 1937); *Board of School Commissioners v. Hahn*, 246 Ala. 662, 22 So. 2d 91 (S. C. 1945).

Failing to make this review and faced with allegations of statutory violations that remained unanswered and a request for tolling the limitations period based on the council's deliberate concealment, the court should not have granted summary judgment and the Appellate Court should not have made additional findings based on the following:

> ***"On such a motion the court is not authorized to decide an issue of fact, but is to determine whether the***

pleadings and record before the court creates an issue of fact to be tried." Ramsouer v. Midland Valley R. Co., 44 F.Supp. 523.

By avoiding these issues and making a finding, the court below and the Appellate Court avoided the following holding:

"A bargain is illegal when its formation is prohibited by statute," see; Naseef v. Cord. Inc., 90 N.J.Super. 135, 142, (A.D.1966), affirmed 48 N.J. 317 (1966).

If it was the Appellate Court's contention that an "as is" sale means accepting the grant condition and the municipal concealment of these facts, then consider the case of Redner v. City of New York, 278 N.Y.S.2d 51, 54, 53 Misc.2d 14,8 which defined "as is" to mean reasonable use, wear, tear and natural deterioration excepted. That case also reviewed the findings of other cases that do not require a purchaser, even from a municipality, to purchase property in such a condition that he may be involved in a lawsuit to remove an encroachment, even though he had knowledge of its existence at the time he bid at the auction, unless he expressly undertook to purchase subject to the easement or encroachment. Pryor v. City of Buffalo, 197 N.Y. 123, 90 N.E. 423; Fossume v. Requa, 113 N.E. 330; Clark v. Riverhead Savings Bank, 1022 N.Y.S. 2d 808.

The Appellate Court knew that the respondent purposely concealed the grant condition based on their opinion:

"he cites no authority for the proposition that "the Township would have a duty to disclose the condition to every buyer" in essence, that before the sale a municipality must affirmatively disclose all facts which can be disclosed by appropriate searches and inquiries of government agencies."

N.J.S.A. 40A:12-13 goes beyond disclosure; it prohibits the sale of lots **"restricted pursuant to law"**, as does the following Supreme Court holding:

"Property which is held by these corporations upon conditions or terms in a grant and for a special use, may not be diverted by the legislature." *Worchester v. Street Railway Co.*, 196 U.S. at 551, 1904

63 C.J.S. § 968 a. on Municipal Corporations sale of land requires:

(5) Good faith and freedom from fraud . . . . . (6) Municipal compliance with covenants.

However, the Appellate Court relies on the following clause:

[n]o representations of any kind . as to the condition".

The Appellate Court had previously held:

"We hold that an exculpatory clause may expressly excuse or limit liability for negligent contract performance, but that such a clause does not operate to bar a claim of willful and wanton misconduct." *Tessler & Sons, Inc. v. Sonitrol Sec. Systems*, 203 N.J.Super. 477 (A.D.1985).

During *Weintraub v. Krobatsch*, 64 N.J. at 455, the Supreme Court reviewed findings from California cases as it

applies to fraud in real estate sales, then cited and accepted the following finding:

> ***"not only on the basis of positive misstatements and misrepresentations of facts allegedly made by Dolman, but also the alleged suppression and nondisclosure of facts known to him, and unknown and unobservable by plaintiffs. 33 Cal.Rptr. at 667"***

This finding separates a positive misrepresentation, which applies to the Township's presenting the sewer lateral as the means of servicing the lots, from a suppression or nondisclosure, by concealing the EPA grant condition. This distinction between positive misrepresentations and nondisclosure of a known fact is affirmed in the foilowing:

> ***"[T]he elements necessary to prove fraudulent concealment on the part of a seller in a real estate action are the concealment or nondisclosure by the seller of a material fact"*** New Jersey D.E.P. v. Ventron Corp., 94 N.J. 473, 468 A.2d 150 (1983).

The Appellate and Supreme Courts of N.J. avoid their own findings on several issues related to fraud by accepting an exculpatory clause, taking a technical view of it, and by avoiding previous holdings on fraud. They put a municipal fraud above the law and condone the concealment of a material fact that affects purchase. The result of such a review offends substantive due process.

If it is the Appellate Court's contention that "as is" meant acceptance of these deficiencies despite a fraud, the

following cases found that fraud will vitiate "As Is" contract. *Packard-Dallas, Inc. v. Carle, Tex.Civ.App.*, 163 S.W.2d 735, 737; *New England Foundation Co. v. Elliot A. Watrous, Inc.*, 27 N.E. 2d. 756, 759, 306 Mass. 177. The Appellate Court's finding violates the Fourteenth Amendment and the following well stated finding, which is still appropriate today:

> ***"We have said the prohibitions of the Fourteenth Amendment are addressed to the States. They are, "No State shall make or enforce a law which shall abridge the privilege or immunities of citizens of the United States, . . . nor deny to any person within its jurisdiction the equal protection of the laws." They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty, without due process of law, or denies or takes away the equal protection of laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."*** *Ex Parte Virginia*, 100 U.S. 339, (1879). (Emphasis Added)

ARGUMENT 9

TOWNSHIP ATTORNEY ACTED AS AN ADVOCATE-WITNESS AND RISKS A FRAUD UPON THE COURT

Mr. Bell, the attorney for the respondent, violated **RPC 3.7** by asserting the following as an advocate-witness in his statement of facts to Judge Harper:

> ***"The Township of Rockaway was prepared to grant an endorsement of his request when said restriction was brought to the Municipal Attorney's attention by the Municipal Engineer"*** (emphasis added).

This statement of personal knowledge meets the judicial expressions upon the subject in *Schwartz v. Wenger*, 267 Minn. 40, 43-44, 124, N.W. 2d 489, 492 (Sup. Ct. 1963), and in *Erwin M. Jennings Co. v. DiGenova*, 107 Conn. 491, 499, 141 A. 866, 869 (Sup.Ct.Err.1968). The court in the latter case held: (Opinion # 233, 254/Ethics)

> ***"The great weight of authority in this country holds that the attorney who acts as counsel and witness, in behalf of his client, in the same cause on a material matter, not of a merely formal character, and not in an emergency, but having knowledge that he would be required to be a witness in ample time to have secured other counsel and given up his service in the case, violates a highly important provision of the Code of Ethics and a rule of professional conduct, but does not commit a legal error in so testifying, as a result of which a new trial may be granted."***

Mr. Bell created the impression that the Council was unaware of the grant condition until he brought this fact to their attention. He then states the contrary in a brief to Judge Russell: (DB319)

> ***"Mr. Fernandes admits, by his own affidavit, that he knew of the EPA Grant Condition (and the Township's concealment of same and decision to sell despite it)."***

By admitting that the council deliberately concealed the Grant Condition, he admits his misstatement and the town's concealment. Had the court not dismissed these issues, he and the engineer would have testified to a fact that he subsequently recants. Mr. Bell's actions meet the following finding, which resulted in a new trial:

> ***"even if the lawyer has no duty to disclose the whole truth, he does have a duty not to deceive the trier of fact, an obligation not to hide the real facts behind a facade."*** U.S. Ex Rel. Triano v. Superior Ct. of N.J., 393 F.Supp. 1061 (1975)

Mr. Bell admits the truth to Judge Russell in order to make it appear the petitioner's case is beyond the statute of limitations for the federal claims. However, Judge Russell didn't accept this contention, based on the following finding:

> ***"But he didn't know, he thought it came on after he got the property."***

Mr. Bell's retort confirms the Council's presale knowledge,

"That doesn't mean we didn't." (T71)

The case of *General Mill Supply Co. v. SCA Services, Inc.*, 697 F2d. 704, 716 (1982) found motions to be part of the trial when reviewing an advocate-witness case:

> ***"Under the Fed.R.Civ.P. the ultimate "trial" is connected as a seamless web to the ascertainment of issues at pretrial proceedings, and particularly to the discovery depositions. . . . . The most acute evils we would foresee from failure to enforce the canon in this instance would occur in the pretrial period, the one in which the most time and money is consumed in civil cases."***

This case also concluded that the court should *sua sponte* raise ethical problems involving danger to a just, speedy and inexpensive remedy . . . but the court did not. Mr. Bell was required by the N.J. code of ethics to withdraw from the case . . but he did not. The petitioner, being a pro se litigant unaware of this ethical responsibility, should be entitled to a trial in conformance with the findings in *Erwin M. Jennings Co. v. DiGenova*, supra.

In view of Mr. Bell's admission that the Town Council deliberately concealed the grant condition, the Appellate Court should have disregarded Judge Harper's finding:

> ***"as far as anything that has to do with fraud, he's he's time barred."*** (T30,6-8)

The engineer's involvement in this admitted deception puts the township's credibility into serious question which should have resulted in estoppel, in accordance with:

> ***"Hence, even if there is no substantial compliance with the notice provisions of the Tort Claims Act, a public entity will be estopped from asserting this defense "where the interests of justice, morality and common fairness dictate that course.""*** Hill v. Middletown Bd. of Ed., 183 N.J. Super. 36 (A.D.1982)

United States v. Pranth, 764 F.2d 548 (1985) also found the advocate-witness rule to be a fundamental tenet:

> ***"The advocate-witness rule prohibits an attorney from appearing as both a witness and an advocate in the same litigation. This venerable rule is a necessary corollary to the more fundamental tenet of our adversarial system that juries are to ground their decisions on facts of a case and not on the credibility of advocates. Accordingly, adherence to this time-honored rule is more than just an ethical obligation of individual counsel; enforcement of the rule is a matter of institutional concern implicating the basic foundation of our system of justice."***

The following Supreme Court finding recognizes the inherent risk associated with a prosecutor's assertions of personal knowledge during a trial. Those risks are not lessened by a municipal attorney's statements of personal knowledge to a motions judge, especially when he subsequently admits those statements were false:

"Nonetheless, the Supreme Court has admonished that "improper suggestions, insinuations, and, especially assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none." Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935)

I submit to this Court that the failure to respond or act to the above conduct is a finding. The Court's failure to refer the matter for further investigation in accordance with the findings of *Crispin v. Volkswagenwerk, A.G.*, 96 N.J. 366 (1984) appears to condone the attorney's conduct, which may lead to further abuses of this nature. An investigation would have eliminated that impression.

ARGUMENT 10

AN ISSUE OF FACT WAS DECIDED AT THE SUMMARY JUDGMENT HEARING

Judge Harper decided as follows though faced with allegations of concealment, fraud and violations of statute versus the attorney's statement that the Town Council was unaware of the Grant Condition:

"I'm comfortable in finding that even if the complaint weren't time barred, that there's no substance whatsoever to the fraud count because the sale went in accordance with the resolution and even though he might have been told and he may say he's been led into a false sense of security about what he was told, that doesn't rise to the level of a, of a violation of the terms of sale. It doesn't in my mind rise to the level of a, of a, of a fraud."

When asked if the respondent violated **N.J.S.A. 40A:12-13,** the judge's response shows he was uncertain:

"The Court: I'm saying that the manner in which they sold it appears to be consistent with law."

Since the resolution states the sale conforms to statute, how can the judge be certain the sale went according to the resolution without reviewing the statute? Now that it appears the attorney's statement was aimed at achieving a dismissal, it shows the judge's decision was hasty and contravenes the following on summary judgment.

"On such a motion the court is not authorized to decide an issue of fact, but is to determine whether the

pleadings and record before the court creates an issue of fact to be tried." Ramsouer v. Midland Valley R. Co., 44 F.Supp. 523 at 526.

Judge Russell decided that the EPA sewer ban did not make the title unmarketable. This decision of a material fact not at issue is not sufficient to dismiss a federal claim:

"This is an as-is sale, marketable title. As far as I can see from the papers before me, it's a marketable title. The effect of the EPA sewer ban connection did not make it an unmarketable title."

Consequently, these decisions violated the following:

"proceed with care in order that this procedure be not perverted to the trial of disputed questions of fact upon affidavits." .Ramsouer v. Midland Valley R. Co, supra.

The Appellate Court has also violated this principle by affirming the dismissals, then by making further findings based on the summary judgment record. The summary judgment proceeding is to determine if an issue of fact exists for trial, not for the presentation of all the facts as though it were the trial. Therefore, further findings from that record deny the petitioner substantive due process.

ARGUMENT 11

THE COURT DISMISSED STATE LAW ISSUES AFTER RECOGNIZING A MATERIAL ISSUE OF FACT EXISTED

The following shows that Judge Harper recognized that a material issue of fact existed that prevented a decision on the summary judgment motion.

> ***"You're saying that there's some statement in the Township engineer's certification that is factually inaccurate, is that correct?***
> **THE PLAINTIFF:** ***Yes. ****
> ***THE COURT:** ***Okay. What I'm going to suggest is this, that I, I, I, can't hear them or, and determine anything today based on that.****"** (T20-21)

Despite this finding Judge Harper dismissed the state law issues, which contravenes the following:

> ***"proceed with care in order that this procedure be not perverted to the trial of disputed questions of fact upon affidavits."*** .Ramsouer v. Midland Valley R. Co, 44 F.Supp. 523 at 526.

ARGUMENT 12

THE RESPONDENT'S ACTIONS AMOUNTS TO A TAKING

Rockaway's land use ordinance §54-100 L and the EPA grant condition represents a **taking** which offends the 14 th. Amendment. And by deliberately passing a resolution to knowingly sell a lot that violates the 14 th. Amendment, the township violates **42 U.S.C. §1983**.

The chain of events leading to the Township's violation begins with the EPA. They directly impose on municipalities a policing function which is confiscatory in nature. They do so not by virtue of any authority over municipalities, but rather by a contractual condition that requires the RVRSA and its municipal members to take a benefit protected by a federal statute. By doing so, the EPA trespassed limitations in the recipient's ability to contract and police power, which in turn violates the following:

> ***"The prohibitions of the Fourteenth Amendment are directed to the States, and they are to a degree restrictions of State power. It is these which Congress is empowered to enforce, and to enforce against State action, however put forth, whether that action be executive, legislative or judicial. Such enforcement is no invasion of State sovereignty. "*** *Ex parte Virginia*, 100 U.S. 339 (Oct. 1879)

When faced with a national policy outlined in **Executive Order 11990**, the EPA reacted with an interpretation of a regulation that allows them to restrict sewer hook-up, though it appears aimed at the properties of the recipient, not the public. By interpreting it as giving the recipient authority over private property, the EPA interferes with state judicial findings that restrict municipal powers in the area and the prohibition in the 14 th. Amendment. The EPA's action disregards the following holding from *City of Scotsbluff v. Winters Creek Canal Co.*, 53 N.W.2d 543:

> ***"* * * The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. * * * We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."***

The respondent grasped the federal principle and took it a step further. They not only deny access to the sewer system, they also sell these lots, upon reversion for nonpayment of taxes, by concealing the condition in order to profit from its sale and continued taxation. They then by ordinance stop the new owner from developing the lots, which creates a cycle that profits from the continued resale of such lots. This exercise of power is contrary to state judicial holdings and the following holding from *Chicago.*

B. & Q. R.R. Co. v. State, 47 Neb. 549, 66 N.W. 624, 630, 41 L.R.A. 481, 53 Am.St.Rep. 557:

> ***"It will not, of course, be contended that the power of the legislature is in that respect absolute, or that it may at will impose upon property burdens so unreasonable as to work a practical confiscation. There is, as all admit, a limit beyond which it cannot go, and within which it will be confined by the judicial power of the state."***

The EPA Grant Condition imposes a servitude upon lots with wetlands for a period of fifty years, and the township ordinance was legislated in support of that Condition, which cannot be considered incidental. The EPA also denies a right protected by a federal statute as a means of achieving a . . **confiscation**.

In the final analysis, the municipal land use ordinance and the underlying EPA Grant Condition meet the following holding which shows their actions represent a taking:

> ***"Before there can be a taking a servitude must have been imposed upon the land, that is to say, a subjection of the land for a more or less definite time to a use inconsistent with the rights of the owner."*** No. Counties Hydro-Electric Co. v. United States, 70 F.Supp. 900, Peabody v. United States, 231 U.S. 530, 34 S.CT. 159, 58 L.Ed. 351.

The municipal land use ordinance prevents construction by denying hookup to lots known to be in the wetlands. However, the township continues to profit from taxation of the lots, thereby meeting the following finding on **taking**:

"by reason of inability to meet the requirements of the zone in which it is situate, is practically unusable, yet remains subject to the burden of taxation." *AMG Associates v. Tp. of Springfield*, 65 N.J. at 112 (1974), *Nectow v. Cambridge*, 277 U.S. 183, 48 S.Ct. 447, 72 L.Ed. 842 (1928).

The respondent embeds the restriction among other conditions to disguise its transfer to the buyer, so it would appear that the buyer accepted this condition, though this condition prevents the sale according to statute. Their knowledge of the condition while attempting to foist it upon the public is proof of their deliberate efforts to sell a lot so diminished in rights that it represents a taking:

"h) This sale is made subject to such facts as an accurate survey may disclose, existing tenancies, rights of persons in possession, zoning ordinance, easements, existing conditions, covenants and restrictions, codes and ordinances of the applicable municipalities, County of Morris, State of New Jersey, and the United States of America."

CONCLUSION

For the foregoing reasons the petitioner, Nelson A. Fernandes, respectfully requests that a writ of certiorari be granted so the judgment of the New Jersey Supreme Court may be reviewed and reversed.

In view of the state court's expressed displeasure with these issues and the distinct possibility that a remand is required, the petitioner asks this Court to address whatever issues it is empowered to hear. The petitioner fears that the Appellate Court's position on the statutory violation will result in a repetition, unless this Court is able to provide clarification on the federal issues.

Respectfully submitted'

Nelson A. Fernandes - Pro se
9 Fox Run
Denville, New Jersey 07834
(201) 627 - 2138

FILED MAY 13, 1993

SUPREME COURT OF NEW JERSEY

M-1104 September Term 1992

36,376

NELSON FERNANDES,

Plaintiff-Movant,

v.

ROCKAWAY TOWNSHIP TOWN COUNCIL, et al.,

Defendants.

This matter having been duly presented to the Court, it is ORDERED that the motion for reconsideration is denied.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, 11th day of May, 1993.

STEPHEN TOWNSEND

CLERK OF THE SUPREME COURT

certification of

true copy

FILED MARCH 17, 1993

SUPREME COURT OF NEW JERSEY

C-682 September Term 1992

36,376

NELSON FERNANDES,

Plaintiff-Petitioner,

v.

ROCKAWAY TOWNSHIP TOWN COUNCIL, et al.,

Defendants-Respondents.

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-4311-91 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, 15th day of March, 1993.

STEPHEN TOWNSEND

CLERK OF THE SUPREME COURT

certification of true copy

FILED JAN. 22, 1993

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A- 4311-91T2

NELSON FERNANDES,
Plaintiff-Appellent,
v.
Rockaway Township Town Council
AND Township Engineer,
Defendant-Respondants.

Argued December 9, 1992 - Decided Jan. 22, 1993

Before Judges Gaulkin and Stern.

On appeal from the Superior Court of New Jersey, Law Division, Morris County.

Nelson Fernandes, pro se, argued the cause for appellant.

Joseph Bell argued the cause for respondent's (Dorsey & Fisher, attorney) John H. Dorsey on the brief.

PER CURIAM

Plaintiff appeals from a judgment dismissing his complaint which sought rescission and damages from defendants following conveyance by the Township of Rocakaway of a lot purchased by plaintiff at public auction. Plaintiff planned to build a residence on the property and on an adjoining lot which he subsequently purchased. His plans

were frustrated because of a sewer ban imposed by the United states Environmental Protection Agency (EPA). Plaintiff claims that defendants' conduct in selling the lot and thereafter, in the circumstances when the "Township did conceal the existence of the EPA Grant Condition," the engineer "covered up this concealment" and the Township created "a false impression that the lots could be connected to the sewer" (even after "[p]ercolation test results . . . show[ed] these lots violated his federal constitutional and civil rights and various provisions of state law.

Particularly given plaintiff's acknowledgment of the "auction information" indicating that the property was sold "as is," and acknowledging the "terms and conditions" of the sale as embodied in the governing resolution in which the Township expressly made "[n]o representations of any kind . . . as to the condition" of the property, and making the sale subject to "existing conditions, covenants and restrictions" of all relevant government entities including the United States of America and the Township, we see no basis for disturbing the judgment. R. 2:11-3(e)(1)(A),(E).

In light of those provisions, we see no basis for the breach of contract claims advanced by the plaintiff. While plaintiff argues that "[t]he issue before the court is a breach of contract not a tort claim," and cites cases for the

proposition "that contract issues are not subject to the Tort Claims Act," he cites no authority for the proposition that "the Township would have a duty to disclose the condition to every buyer" in essence, that before the sale a municipality must affirmatively disclose all facts which can be disclosed by appropriate searches and inquiries of government agencies. While there may be reasons to suggest that a municipality should generally advise prospective purchasers of a known sewer ban relating to property to be sold at public auction, this is a matter for legislative policy, and we are referred to no authority in statute or case law so holding. We reject plaintiff's argument that N.J.S.A. 40A:12-13 barred the sale as "restricted pursuant to law." To the extent plaintiff relies on the tort claims because of the personal injury aspect of the federal claims, see Wilson v. Garcia, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2D 254 (1985), no timely notice was given as required by statute. See N.J.S.A. 59:8-8, -9.

The trial court concluded that plaintiff's federal civil rights claim pursuant to 42 U.S.C.A. § 1983 was barred by New Jersey's two year statute of limitations. See Wilson v. Garcia, supra; N.J.S.A. 2A:14-2. Plaintiff does not contest the applicable period but contends that defendant's waived the statute of limitations because they failed to raise

the defense in their pleadings. However, the Supreme Court has recognized that the statute of limitations *is not waived* for failure to plead it as an affirmative defense when it is later raised, as heres. in defendant's motion for summary judgment. Fees v. Trow, 105 N.J. 330, 335 (1987); Rappeport v. Flitcroft, 90 N.J. Super. 578, 579-81 (App. Div. 1966).

We also conclude that any procedural defects noted by the plaintiff, even if they constituted error, cannot be said to have affected the result.

Finally, as plaintiff was not a "prevailing party" he was not entitled to the award of counsel fees or costs. See 42 U.S.C.A. § 1983, 1988; N.J.S.A. 2A:15-59.1. See also R. 4:42-8, -9 (a) (9); N.J.S.A. 22A:2-5.

The Judgment is affirmed.

FILED MAY 27, 1992

NELSON FERNANDES, Plaintiff, v.	:	SUPERIOR CT OF N.J. LAW DIV.- MORRIS CNTY
Township of Rockaway, a Municipal Corp. of the State of New Jersey Defendant.	:	DOCK. NO. MRS-L-5845-90 Civil Action ORDER

THIS MATTER having come before the Court on the Motion of Plaintiff for reconsideration, and the Court having considered the submissions of both parties,

It is on this 27 th. day of March, 1992

ORDERED, that reconsideration is denied for the reasons set forth in the attached opinion.

Karen D. Russell, J.S.C.

The are four aspects to plaintiff's most recent motion for reconsideration; namely, (1) plaintiff seeks to vacate the July 10, 1991 Order entered by Hon. John J. Harper dismissing Counts 1, 3, 4, 5, 7, 8, 9, 10 and 11 of the plaintiff's Complaint, (2) plaintiff seeks to vacate the January 2, 1992 Order entered by this Court dismissing Counts 2 and 6 of plaintiff's Complaint, (3) **plaintiff seeks leave to file an Amended Complaint**, and (4) plaintiff seeks an Order that the matter be tried by a jury, rather than non-jury as requested by defendant.

The first issue dealt with an Order entered by Judge Harper, thus the motion papers were forwarded to his attention. He declined to take any action and returned the papers to this Court. A review of the file of the County Clerk indicates that the July 10, 1991 resulted from motions argued and decided on the record by Judge Harper on April 5, 1991. A dispute ensued over the form of Order to be entered. Plaintiff moved for reconsideration, which was argued and denied on the record by Judge Harper on May 31, 1991. The Orders reflecting the decisions of April 5, 1991 and May 31, 1991 were both signed and filed July, 10, 1991 (attached hereto). In response to correspondence from the plaintiff, Judge Harper wrote August 2, 1991 to reiterate that he stood by his decision as set forth on the record. The

motion by plaintiff argued before this Court reconsideration the decision of Judge Harper, who was at the time unavailable due to temporary assignment to Essex County. This Court had no authority to review the decision of Judge Harper and thus refused to do so. Reconsideration of that refusal is denied.

As to the second issue, which was argued before and decided by this Court, the Ferreira decision is applicable, and **the Court agrees with the arguments earlier advanced by the defendant Township that the EPA condition was not a "restriction"**, thus no due process violation occurred upon sale to plaintiff. Plaintiff Fernandez herein received marketable title, even if it is not fully utilizable without installation of an above-ground ISDS, thus no unconstitutional "taking" occurred. Reconsideration is denied.

As to the third issue, reconsideration of the denial of leave to file an amended complaint is denied. The proposed First Count advances a cause of action which was previously dismissed by Judge Harper. The proposed Second Count asserts a cause of action premised on 42 U.S.C.A. Section 1983. As Judge Barry ruled in the November 29, 1992 Order of the District Court dismissing plaintiff's Amended Complaint, "plaintiff has failed to adequately state a claim

for a violation of his federal constitutional rights." Plaintiff fails to plead a cause of action under section 1983. Moreover, even if plaintiff had stated a claim, from the facts as stated in the proposed Amended Complaint, all actions of which plaintiff complains occurred more than two years prior to the proposed Amended Complaint. Pursuant to Wilson v. Garcia, 105 S.Ct. 1938 (1985) for claims under section 1983, the applicable statute of limitations is the New Jersey two-year limitations for actions for personal injury. N.J.S.A. 2A:14-2. Thus, if plaintiff were able to state a claim under Section 1983, that claim would be barred as beyond the applicable statute of limitations. Inasmuch as proposed Counts Three through Eight state claims under the New Jersey Tort Claims Act or 42 U.S.C.A. Section 1983, plaintiff may not assert them in an amended Complaint. These claims are all either previously dismissed by Judge Harper, barred by the notice provisions of the New Jersey Tort Claims Act, or beyond the two-year statute of limitations applicable to Section 1983. In addition, the proposed Fifth and Sixth Counts fail to state a claim in that they are vague and conclusory. And lastly, Count Eight does not state a "taking" claim. As Judge Barry ruled, plaintiff "has certainly not been deprived of all use of his property, see, Bello v. Walker, 840 F.2d 1124, 1131 (3rd. Cir. 1988),

and thus, even if articulately stated, this claim would be dismissed as well." In light of the foregoing, plaintiff's application for leave to file a proposed Amended Complaint was denied.

The fourth issue is moot since the July 10, 1991 Order of Judge Harper in fact granted plaintiff's request that the matter proceed by trial by jury.

FILED JAN. 3, 1992

Dorsey and Bell, P.O. Box 228
Boonton, N.J. 07005
(201) 334-1900

NELSON FERNANDES, Plaintiff,	:	SUPERIOR CT OF N.J. LAW DIV.- MORRIS CNTY
v.	:	DOCKET NO. MRS-L-5845-90
Rockaway Township Town Council, and Township Engineer, Defendant.	:	Civil Action ORDER

THIS MATTER having come before the Court for a hearing on April 5, 1991 on the motion of plaintiff requesting an Order for Partial Summary Judgment as well as Cross-Motions filed by the defendant and the matter having been fully submitted and heard and this matter again being considered by the Court by a motion filed by the plaintiff for reconsideration on March 31, 1991; and

THIS MATTER having come before this Court for a hearing on April 25, 1991. on the motion of defendant requesting an Order for Dismissal for Counts 2 and 6, the remaining counts of plaintiff's Complaint and the matter having been fully submitted and heard;

IT IS HEREBY ORDERED on this 2 nd. day of January, 1992 as follows:

1. The defendant's motion requesting the Court to strike and dismiss the remaining counts of plaintiff's original counts to wit: Count 2 and 6 is hereby granted.

Karen D. Russell, J.S.C.

FILED JULY 10, 1991

NELSON FERNANDES, Plaintiff,	:	SUPERIOR CT OF N.J. LAW DIV.- MORRIS CNTY
v.	:	DOCK NO. MRS-L-5845-90
Township of Rockaway, a Municipal Corp. of the State of New Jersey	:	Civil Action
Defendant.	:	ORDER ON RECONSIDERATION

THIS MATTER having come before the Court for a hearing on April 5, 1991 on the Motion of Plaintiff requesting an Order for Partial Summary Judgment as well as Cross-Motions
filed by the defendant and the matter having been fully submitted and heard; and

THIS MATTER again being reconsidered by the court on a Motion filed by the Plaintiff for reconsideration on May 11, 1991; and

THE COURT having again considered the papers submitted as well as arguments of counsel and for good cause
shown;

It is hereby ordered this 10 th. day of July, 1991 as follows:

1. The Plaintiff's Motion requesting an Order for Partial Summary Judgment is hereby denied.

2. The Defendant's Cross-Motion requesting the Court to strike and dismiss Counts 1, 3, 4, 5, 7, 8, 9, 10, and 11 of Plaintiff's Complaint is hereby granted.

3. The Plaintiff is permitted to litigate Counts 2 and 6 of his Complaint asserting that his United States and New Jersey Constitutional Rights have been violated pursuant to 42 U.S.C. Subsection 1983.

4. Discovery in this matter is continuing, however, the discovery conducted pursuant to the initial Federal Court Action can be used in the New Jersey Superior Court action. Videotaped depositions may be conducted as part of the discovery process.

5. The Plaintiff's request for a trial by jury is hereby granted.

John J. Harper, J.S.C.

AMENDMENT V OF THE CONSTITUTION:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

AMENDMENT XIV OF THE CONSTITUTION

"Section 1. All persons born or naturalized in the United States , and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

U.S.C. 2000D. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on grounds of race, color, or national origin.

No person in the United States shall, on the ground of race, color or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

U.S.C. 42 § 4331 Congressional declaration of national environmental policy

"(a) The Congress, recognizing the profound impact of man's activity on the interactions of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local government, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance , in a manner calculated to foster and promote the general welfare , to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans."

Subpart F - What Other Federal Requirements Must I Comply With?

You must comply with all applicable Federal Laws.

(e) Civil Rights Act. You must comply with section 602, Title VI of the Civil Rights Act of 1964, **(42 U.S.C. 2000d)**, and related nondiscrimination laws and Executive Order 11246. **These authorities prohibit you from excluding any person from participating in, denying them the benefits of,** or discriminating against them on the basis of race, color, or national origin under any program or activity involving Federal financial assistance, sec. 40 CFR Parts 7 and 8 for specific requirements.

§6.302 Wetlands, floodplains, important farmlands, coastal zones, wild and scenic rivers, fish, and wildlife, and endangered species.

The following procedures shall apply to EPA administrative actions in programs to which the pertinent statute or executive order applies.

(a) Wetlands protection. Executive Order 11990, Protection of Wetlands, requires Federal agencies conducting certain activities to avoid, to the extent possible, the adverse impacts associated with the destruction or loss of wetlands and to avoid support of new construction in wetlands if a practical alternative exists. EPA's Statement of Procedures on Floodplain Management and Wetlands Protection (dated January 5, 1979, incorporated as Appendix A hereto) requires EPA programs to determine if proposed actions will be in or will affect wetlands. If so, the responsible official shall prepare a floodplains/wetlands assessment, which will be part of the environmental impact statement. The responsible official shall either avoid adverse impacts or minimize them if no practical alternative to the action exists. (emphasis added)

§ 35.925-13 Sewage Collection System.

(e) The system would not provide capacity for new habitations or other establishments to be located on environmentally sensitive land such as wetlands, floodplains or prime agricultural lands. Appropriate and effective grant conditions, (e.g. restricting sewer hookup) should be used where necessary to protect these resources from new development.

Executive Order 11990 as signed by Jimmy Carter on 5/24/77, which provides in part, Section 2. (a):

"**each agency, to the extent permitted by law**, shall avoid undertaking or providing assistance for new construction located in wetlands unless the head of the agency finds (1) that there is no practicable alternative to such construction, and (2) that the proposed action includes all practicable measures to minimize harm to wetlands which may result from such use. In making this finding the head of the agency may take into account economic, environmental and other pertinent factors." (emphasis added)

(The following grant condition imposed by the EPA, represents a violation of federal statute and regulation by both the EPA and the RVRSA, as well as, its member communities that legislated land use ordinances in support of this grant condition)

Assistance I.D. No. C340389-04 amendment no. 1

(4.b.) " The grantee agrees that **for a period of 50 years** from November 29, 1983, **no sewer hookup** or other connection to the sewage treatment facilities included in the scope of this grant **will be allowed or permitted** so as to allow the discharge of wastewater from any building, facility or other construction on any parcel of land, as delineated on the maps cited in (a) above, that is within any wetlands or within the 100 year floodplain, which land parcel as of November 29, 1983 was undeveloped (i.e., upon which no building, facility or other construction has been erected or placed) unless approved in writing by the Regional Administrator." (emphasis added)

(4.c.) "This condition is intended to benefit any persons or private organization or government entity which may have an interest in the avoidance of any future development in the designated areas. Any such beneficiary (who may otherwise have standing to seek enforcement and the right to begin such action in a court of competent jurisdiction) may seek to enforce compliance with this condition in the courts of the State of New Jersey against the Grantee or any nonfederal person, organization, or entity subject to this condition if notice of intent to seek such enforcement is first given to the EPA Regional Administrator, the NJDEP, the Grantee and affected governmental entities and if none of those so noticed initiates corrective action within ninety days of such notice."

63 C.J.S. on Municipal Corporations § 968 a. regarding the sale of land, includes the following two elements as being essential: (5) Good faith and freedom from fraud . . . . . (6) Municipal compliance with covenants.

N.J.S.A. 40A:12-13. Sales of real property.

"Any county or municipality may sell any real property, capital improvement or personal property, or interests therein, not needed for public use, as set forth in the resolution or ordinance authorizing the sale, other than county or municipal lands, real property **otherwise dedicated or restricted pursuant to law**, and, except as otherwise provided by law, all such sales shall be made by one of the following methods:" (emphasis added)

N.J.S.A. 40A:12-13 (a)

"Such ***restrictions or conditions shall be related to a lawful public purpose*** and encourage and promote fair and competitive bidding "

N.J.S.A. 40:48-2

"Any municipality may make, amend, repeal and enforce such other ordinances, regulations, rules and by-laws **not contrary to the laws of this state or of the United States** as it may deem necessary and proper for the good government, order and protection of persons and property, and for the preservation of the public health, safety and welfare of the municipality and its inhabitants, and as may be necessary to carry into effect the powers and duties conferred and imposed by this subtitle, or by any law." (emphasis added)

N.J.S.A. 46:4-6

"A covenant by the grantor in a deed "that he has done nothing to encumber the said lands", shall have the same effect as if he covenanted that he had not done or executed, or knowingly suffered to be done or executed, any act, deed or thing whereby the lands and premises conveyed, or intended so to be or any part thereof, are or will be changed, charged, altered, affected, defeated, or encumbered in title, estate or otherwise." (emphasis added)

N.J.S.A. 54:5-43. If sale set aside: tax refund to purchaser.

If the assessment itself is valid and the tax, assessment or other municipal charge, or any part thereof, is justly due, no sale shall be set aside, except on condition that the amount due shall be paid to the municipality for the use of the holder of the certificate of sale by the person applying to set it aside. If the sale shall be set aside, the municipality shall refund to the purchaser the price paid by him on the sale, with lawful interest, upon his signing to the municipality the certificate of sale and all his interest in the tax assessment or other charges and in the municipal lien therefor, and the municipality may readvertise and sell if the municipal lien remains in force.

§54-100. ROCKAWAY'S LAND USE ORDINANCE

"No land or premises may be used and no building or structure may be erected, razed, moved, extended, enlarged, altered or used for any purpose unless and until all provisions of this section are complied with:"

§54-100 L.

"Wetlands. **The connection of any structure, to the Rockaway Valley Regional Sewer Authority sewer system, on lands classified as wetlands is prohibited unless a waiver is granted by said Authority.** For the purpose of administering this provision wetlands are delineated on a set of municipal tax maps available for inspection at the office of the Township Engineer. Any lands designated as wetlands may be counted as part of a tract acreage for the purpose of computing the maximum density permitted in the zone in which it is located."

Supreme Court, U.S.
FILED
AUG 16 1993
OFFICE OF THE CLERK

(2)

No. 93-88

In The

Supreme Court of the United States

October Term, 1993

NELSON A. FERNANDES,

Petitioner,

vs.

ROCKAWAY TOWNSHIP TOWN COUNCIL AND TOWNSHIP ENGINEER,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

JOHN H. DORSEY
Counsel of Record
DORSEY AND FISHER
Attorneys for Respondents
714 Main Street
P.O. Box 228
Boonton, New Jersey 07005
(201) 334-1900

DOUGLAS R. CABANA
On the Brief

4086
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

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No. 93-88

In The

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October Term, 1993

NELSON A. FERNANDES,

Petitioner,

vs.

ROCKAWAY TOWNSHIP TOWN COUNCIL AND TOWNSHIP ENGINEER,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Respondent Township of Rockaway sold municipally-owned land no longer needed for public use to Petitioner Nelson Fernandes at an auction on September 21, 1985. This sale was conducted lawfully pursuant to N.J.S.A. 40A:12-1 *et seq.*

The Township Council authorized the auction in a resolution it approved on August 6, 1985. The sale of the municipal lands no longer needed for public use was to be subject to the following relevant terms and conditions:

. . . (f) All conveyance shall be by bargain and sale Deed with covenants against grantors acts. *No Affidavit of Title will be provided.* [emphasis supplied].

(h) This sale is made subject to such facts as an accurate survey may disclose, existing tenancies, rights of persons in possession, zoning ordinance, easements, existing conditions, covenants, and restrictions, codes and ordinances of the applicable municipalities, County of Morris, State of New Jersey and the *United States of America.* [emphasis supplied].

(i) No representations or any kind are made by the Township of Rockaway as to the condition, area or boundaries of the property herein relevant. *Said premises are being sold in their present condition "as is."* [emphasis supplied].

(j) If the title to this property shall prove to be unmarketable, liability of the Township of Rockaway shall be limited to repayment to the purchaser of the amount of his other deposit and the balance of the purchase price (if paid) . . . *Notice of the alleged defects of title or claim of unmarketability shall be given to the Township of Rockaway in writing not less than thirty (30) days after the sale.* The successful bidder agrees that the failure to give such notice shall be deemed conclusive evidence that the purchaser accepts the title in its then present condition. [emphasis supplied].

(k) Bidders are advised that no employee, agent or official of the Township of Rockaway has any authority to waive, modify or amend any of the conditions of sale therein provided.

(l) It is conclusively presumed that a bidder, prior to making his or her bid, had done the following:

1. Checked the exact location, including the correct street address, boundaries and the size of the property.

2. Checked the zoning restrictions to ascertain the current legal use of the property.

3. Made a personal inspection of the property prior to bidding.

These terms and conditions make it unmistakably clear that at the auction, purchasers such as Petitioner, received nothing more than marketable title to any land sold. The Township specifically refused to provide an Affidavit of Title to purchasers. It also told purchasers that the lands were being sold subject to existing easements, restrictions, and applicable local, county, state and federal laws and regulations, whatever those might be. By the terms and conditions of this sale, the onus fell on purchasers to determine whether what they planned to do on the property was legally feasible. Respondent Township was clearly not promising any purchaser that the potential "best and highest" use of that tract was permissible or feasible.

Petitioner offered the successful bid of $10,000 on Block

20504, Lot 8 located at 15 Cayuga Avenue within the Township. The lot was smaller than the minimum size set by the Township's zoning ordinance and residential development. A portion of the lot was also covered by environmentally-sensitive freshwater wetlands. However, Petitioner, an experienced home builder and/or speculator in undeveloped property, knew the lot was undersized and did inspect the subject property. After his inspection, he decided to purchase. He later purchased the adjacent Lot 9, planning to subdivide the two lots into two "buildable" lots.

At the time of his successful bid, Petitioner signed a form entitled "Auction Information for Bidders for Properties being Sold for Rockaway Township." This form described the terms of the sale including the requirement to sign a contract, and deposit with the Township $500 no later than two days after the auction. It also contained the following paragraph which is relevant to the case at bar:

> *Acceptance of a Bidding Number indicates that the Bidder has read, understands, and agrees to these terms and conditions, as well as the provisions of the Township's published resolution and contract, which together with this information form the terms and conditions of this sale . . . I have read and accepted these terms and conditions.* [emphasis supplied].

Petitioner took title to the lot at 15 Cayuga Avenue, with the assistance of the law firm of Somer & Englehardt, by deed recorded with the Morris County Clerk on November 15, 1985. Petitioner had a title search done at the time of the purchase but chose not to pay for title insurance. Petitioner claims to have conducted, at approximately the same time, percolation tests on Lots 8 and 9 and those tests purported to indicate that a below-ground Individual Septic Disposal System (I.S.D.S.) would not be

feasible. As previously stated, Petitioner's intention was to build and sell a detached, single family dwelling on Lots 8 and 9. The Planning Board approved his application for a minor subdivision on October 20, 1986. Petitioner hoped to connect this home to the municipal sanitary sewer line that ran adjacent to his lots. This application was rejected, however, because of a grant condition imposed by the federal government in 1983 when it provided the Township with a portion of the money needed to build the sanitary sewer system to which Petitioner wished to connect. Petitioner's lots, according to the United States Environmental Protection Agency (EPA), are located in an environmentally sensitive area (ESA). Lots within an ESA cannot be connected to federally-funded sanitary sewers, in order to protect the wetlands which create an ESA designation, from sewer-induced development. The lots owned by Petitioner were designated as within an ESA and were two of approximately 140 lots in the Township impacted by the ESA grant condition prohibiting connections to the municipal sanitary sewer. Correspondence confirming this is dated September 30, 1983 from the consulting engineers who delineated the ESA's to then Township Mayor Wojtaszek.

The Township cooperated with Petitioner in his attempt to obtain a waiver from this ban, including allocation of sewer gallonage (subject to EPA approval) and approval of a wetlands waiver as part of his application for waiver to the EPA. But on May 5, 1989, the Rockaway Valley Regional Sewerage Authority (RVRSA) received a letter from the EPA's Acting Regional Administrator denying the request.

This law suit arose because Petitioner alleged that he is the owner of a worthless tract that can neither be connected to the municipal sanitary sewer, nor sustain a below-ground ISDS. Petitioner conveniently ignored the option of an above-ground ISDS for the lots in question.

Petitioner, appearing *pro se*, filed a lawsuit in the United States District Court, District of New Jersey, some time in early 1990. The cause of action asserted by the Petitioner arose under 42 U.S.C. § 1983, *i.e.*, the Township officials, under color of state law, acted to deprive Petitioner of his constitutional rights. The Hon. Maryanne Trump Barry, U.S.D.J., on November 29, 1990 entered an order dismissing the petitioner's complaint for failure to adequately state a claim for a violation of his federal constitutional rights. (Ra 1)[1].

The Petitioner subsequently filed a complaint in the New Jersey Superior Court, Law Division on December 4, 1990. The Township filed its answer on or about February 21, 1991, pursuant to a consent order permitting a late filing. Petitioner then filed a motion, returnable April 5, 1991, for "partial summary judgment" and subsequently, tacked on to that same motion, a request for a jury trial as well as permission of the court to allow the entry into evidence of videotaped depositions. In what respect the summary judgment was "partial" was not made clear by Petitioner's moving papers. Respondent Township made a cross motion to dismiss the complaint. The Petitioner's motion was denied while the Respondent Township's motion was granted with an exception by the Hon. John J. Harper, J.S.C. on July 10, 1991. Judge Harper's order, dismissed all counts except counts two and six. Count two alleged that Respondent Township violated the provisions of N.J.S.A. 40A:12-1 *et seq.* and by doing so, violated the Petitioner's constitutional right to due process. Count six alleged that actions of the Township or its agents constituted a "taking" without compensation in violation of his rights under the Fifth Amendment.

Leave to file an amended complaint with a supporting brief was filed with the federal district court by Petitioner on August 7,

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1. "Ra" refers to Respondents' Appendix.

1991. Respondent Township filed its brief in opposition on or about August 8, 1991 and a response was filed by the Petitioner on August 30, 1991. Judge Maryanne Trump Barry dismissed this matter and stated that "justice does not require this Court to grant Plaintiff leave to amend the Complaint." (Ra 7). Petitioner did not appeal the dismissal in the federal district court.

Respondent then filed a motion in New Jersey Superior Court, Law Division, to dismiss the remaining counts of Petitioner's complaint on or about August 10, 1991. This matter was adjourned pending the signing of the federal court order by Judge Barry. A motion to file an amended complaint in the New Jersey Superior Court, Law Division, was instituted by Petitioner and responding briefs were filed on or about October 10, 1991. Hon. Karen Russell, J.S.C., conducted a hearing in this matter on October 25, 1991 and the order dismissing the remaining counts was entered on January 3, 1992. (Pa 72)[2].

On December 3, 1991, Petitioner filed a motion for reconsideration. Respondent Township filed a responding letter brief on January 7, 1992. The jurist noted that "these claims are all either previously dismissed by Judge Harper, barred by the notice provisions of the New Jersey Tort Claims Act or beyond the applicable Statute of Limitations for Section 1983 claims as well as Plaintiff's counts filed to state a cause of action upon which relief can be granted as well are vague and conclusory." (Pa 70).

On May 20, 1992, the Petitioner filed a motion for summary disposition and sanctions with the Superior Court of New Jersey, Appellate Division. The Respondent, Township of Rockaway filed an answer on June 12, 1992.

The Superior Court of New Jersey, Appellate Division on June

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2. "Pa" refers to Petitioner's Appendix.

23, 1992 denied Petitioner's motion and permitted the Respondent to rely on its motion brief and its merits brief. The matter was argued on December 9, 1992 before Judges Gaulkin and Stern. In a *per curiam* opinion, the Appellate Division found "no basis for disturbing the judgment," "no basis for the breach of contract claims advanced by Plaintiff" and they affirmed the judgment of the trial court. *Fernandes v. Rockaway.* (Pa 63).

On February 4, 1993, Petitioner filed a notice of petition for certification from the judgment of the Superior Court of New Jersey, Appellate Division with the Clerk of the New Jersey Supreme Court. The Township filed its brief in opposition to the petition for certification on February 18, 1993. The petition was denied by the court on March 15, 1993. (Pa 62). Thereafter, Petitioner filed a motion for reconsideration with the New Jersey Supreme Court urging the court to reconsider his petition. The court denied petitioner's request on May 11, 1993. (Pa 61).

On July 14, 1993 Petitioner served Respondent with his petition seeking a writ of certiorari with the United States Supreme Court.

Petitioner apparently claims that had he known of the EPA grant condition when the auction occurred, he would have made a different economic decision and not purchased the subject property. The Township should not be held responsible for the consequences of Petitioner's financial decisions. By the precisely stated terms and conditions of the 1985 auction, the Respondent Township promised to convey marketable title and nothing more. The EPA grant condition did not deny Petitioner marketable title and the Township conveyed the property pursuant to the terms and conditions which Petitioner had agreed to at the time of the sale.

The matters of federal and state law herein presented have been ruled upon by the state courts and have been upheld.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO JURISDICTION TO GRANT A WRIT OF CERTIORARI.

The petition submitted to the Court does not present questions for review that meet the criteria necessary for this Court to grant a writ of certiorari. A writ of certiorari is granted by judicial discretion only when there exists "special and important reasons therefore." Rule 10.1. To illustrate the character of reasons which may be deemed "special and important," Rule 10.1 refers to cases:

> [W]hen a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States Court of Appeals or
>
> [W]hen a state court . . . has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way that conflicts with applicable decisions of this Court. [Rules 10.1(b), 10.1(c)].

In the case *sub judice,* there is not one single special or important reason articulated on which to grant certiorari.

> "Special and important reasons" imply a reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for there comes into play regard for the court's duty to avoid decision of

> constitutional issues unless avoidance becomes evasion.

Rice v. Sioux City Memorial Park Cemetery, 75 S. Ct. 614, 349 U.S. 70, 99 L. Ed.897 (1955). Certiorari should not be granted except in those cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion or authority between the courts. *Rice v. Sioux City Memorial Park Cemetery, supra,* 75 S. Ct. at 620, 349 U.S. at 79, 99 L. Ed. 897 quoting *Layne & Bowler Corporation v. Western Well Works,* 261 U.S. 387, 393, 43 S. Ct. 422, 423, 67 L. Ed. 712 (1923). Here, petitioner has not presented to the Court any real and embarrassing conflict with another state court of last resort or in the decisions of this Court. There is simply no conflict whatsoever presented for consideration.

The questions presented for review are vague and unspecific. The petition is devoid of any authority to demonstrate a conflict. Petitioner has taken a scattershot approach in hopes that this Court will find an issue in which to grant certiorari. Notwithstanding the fact that Petitioner has presented his claims in the federal district court and in three levels of the New Jersey courts, the specific constitutional rights he seeks to vindicate remain unclear. The inference can be drawn, though not clearly stated, that a basis for the petition to this Court is primarily the Fourteenth Amendment through the Due Process Clause. Even assuming that Petitioner is seeking to bring a due process challenge under the Fourteenth Amendment of the Constitution, a claim he has not articulated with any specificity, the facts in this case do not support his contentions. The broad statement that he was "denied due process by the erroneous application of the statute of limitations" (Pet. p. i) has no basis most especially in light of the fact Petitioner filed his complaint well in excess of the two year statute of limitations.

Concerning issues of state law, again Petitioner fails to clearly articulate with any specificity where his rights have been violated. The judgments of the New Jersey courts are well reasoned and have applied the appropriate principles of law. *See* Appellate Division opinion (Pa 63, 66) and Law Division opinion (Pa 67, 71). When a judgment below rests on an independent and adequate state ground, the writ of certiorari should be dismissed, *Wilson v. Loew's Inc.*, 78 S. Ct. 526, 355 U.S. 597, 2 L. Ed. 2d 519 (1958) for "[o]ur only power over state judgment is to correct them to the extent that they incorrectly adjudge federal rights. And, our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the State court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn,* 65 S. Ct. 459, 463, 324 U.S. 117, 125-126, 89 L. Ed. 789 (1945). The judgment of the New Jersey state courts rests on adequate and independent state grounds as articulated in the opinions of the lower courts, *see supra* (Pa 63, 66, 67 to 71) nor are there any special or important reasons presented to disturb the judgment of the New Jersey courts.

Petitioner asserts that jurisdiction is invoked pursuant to 28 U.S.C. § 1257(3) now 28 U.S.C. § 1257(a). In pertinent part the statute provides:

> (a) Final judgments or decrees rendered by the highest court of a state . . . . may be reviewed by the Supreme Court by writ of certiorari where the validity of a . . . statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the grounds of its being repugnant to the Constitution or laws of the United States . . .

Other than the mere assertion of jurisdiction under the foregoing statute, Petitioner cites no authority nor raises any challenge to the validity of the applicable federal or state law. In order for this Court to exercise jurisdiction on the grounds that a statute is repugnant to the Constitution, the challenge must be distinct and substantial. *House v. Road Improv. Dist.*, 45 S. Ct. 60, 266 U.S. 175, 68 L. Ed. 229 (1924). Petitioner's simple assertion, by way of single statement that the applicable state statutes are repugnant to the Constitution or to the laws of the United States without substantiation is insufficient grounds for this Court to grant a writ of certiorari.

Moreover, Rule 29.4(c) requires that a petitioner questioning the constitutionality of any state statute and the State is not a party thereto, must file the initial pleading with this Court reciting that 28 U.S.C. § 2403(b) may be applicable and be served upon the state attorney general. As petitioner has asserted jurisdiction pursuant to 28 U.S.C. § 1257(a) he has an affirmative duty to comply with the requirement for service upon the New Jersey Attorney General. His failure to do so rendered his petition defective.

II.

MATTERS OF STATE OR FEDERAL LAW WERE CORRECTLY DECIDED BY THE NEW JERSEY COURTS.

This action began when Petitioner filed a 42 U.S.C. § 1983 action in the federal district court for the District of New Jersey. The Honorable Maryanne Trump Barry, U.S.D.J. entered an order dismissing the complaint on November 29, 1990 for failure to adequately state constitutional rights. (Ra 1). Petitioner never appealed from Judge Barry's dismissal of his 1983 claim.

Thereafter, Petitioner brought his case to the Superior Court of

New Jersey which considered both the state and federal claims. In affirming the judgment of the trial court, the Appellate Division of the New Jersey Superior Court concluded:

> Particularly given plaintiff's acknowledgment of the "auction information" indicating the property was sold "as is," and acknowledging the "terms and conditions" of the property, and making the sale subject to "existing conditions, covenants and restrictions" of all relevant governmental entities including the United States of America and the Township, we see no basis for disturbing the judgment. [citation omitted]
>
> In light of those provisions, we see no basis for the breach of contract claims advanced by plaintiff. While plaintiff argues that "[t]he issue before the court is a breach of contract not a tort claim," and cites cases for the proposition "that contract issues are not subject to the Tort Claims Act, he cites no authority for the proposition that the Township would have a duty to disclose the condition to every buyer . . ." *Fernandes v. Rkwy Tp. Town Council* [Pa 64].

The Appellate Division further rejected the argument that N.J.S.A. 40A:12-13 barred the sale by the Township as "restricted pursuant to law." (Pa 65). While Petitioner references a state law governing the method of sale which public entities must follow when offering lands at public auction, *see* N.J.S.A. 40A:12-13, he nowhere alleges in what manner the failure to follow the provisions of this law, if there was a failure by Township officials, violated his federal or state constitutional rights.

Respondent conducted the property auction in strict accordance with the statute on August 5, 1985. The Township Council authorized the sale by resolution and conducted an open public sale at auction to the highest bidder, the Petitioner, after an advertisement in local newspapers within the specified time required by statute. N.J.S.A. 40:12-13(a).

Thus, assuming *arguendo* that Petitioner did demonstrate failure on behalf of Respondent to conduct the auction pursuant to statute, he has exhausted his legal remedies in the state courts and has not been denied due process.

> Where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . current authority indicates that due process has been provided, and that section 1983 is not a means for litigating the correctness of the state or local administrative decision in a federal forum . . . [One's right to] property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under relevant state statutes. *Creative Environments, Inc. v. Estabrook,* 680 F.2d 822, 832, n. 9 (1st Cir. 1982), *cert. denied,* 459 U.S. 989 (1982).
>
> A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where state courts are available to correct the error. *Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524, 1528 (1st Cir. 1983).

There is no basis for petitioner's assertion that the sale by the Township was barred as restricted pursuant to law.

The petitioner's federal civil rights claim pursuant to 42 U.S.C. § 1983 was barred by New Jersey's two year statute of limitations. "To the extent plaintiff relies on tort claims because of the personal injury aspect of the federal claims, *see Wilson v. Garcia,* 105 S. Ct. 1938, 471 U.S. 261, 85 L. Ed. 2d 254 (1985), no timely notice was given as required by statute. *See* N.J.S.A. 58:8-8, -9" (Ra 65). Under New Jersey law, the two year statute of limitations applies to all personal injury claims, whether based on tort or contract, *Oroz v. American President Lines, Limited,* 259 F.2d 636 (1958), *cert. denied*, 79 S. Ct. 584, 359 U.S. 908, 3 L. Ed. 2d 572 (C.A. N.Y.) and is applicable to bar civil rights actions. *Cito v. Bridgewater Tp. Police Dept.,* 892 F.2d 23 (3rd Cir. 1989), *rehearing denied.* In the state proceedings, petitioner did not contest the applicable period of limitation in which to file his 1983 claim. (Pa 65). However, before this Court Petitioner now asserts his claim in an effort to secure jurisdiction. Furthermore, Petitioner now raises a jurisdictional claim under 42 U.S.C. § 2000d, a claim that was not raised before the state courts. The Respondent respectfully submits that Petitioner's acknowledgment of the proper application of the two year statute of limitations and failure to assert a claim under 42 U.S.C. § 2000d bars him from raising these issues before this Court.

Petitioner fails to set forth any error committed by the state courts in their determination which would indicate a result being repugnant to the Constitution or to any law of the United States or New Jersey. The state court properly decided the issues of federal and state law before it and the judgment of the state court should not be disturbed.

CONCLUSION

Based upon the foregoing reasons, it is respectfully requested that this Court should deny certiorari as the decision of state and federal law was correctly decided by the New Jersey courts, no conflict exists between the New Jersey Supreme Court and any state court of last resort or a United States Court of Appeals and Petitioner has failed to present a substantial question for review by the Supreme Court of the United States of America.

Respectfully submitted,

JOHN H. DORSEY
Counsel of Record
DORSEY AND FISHER
Attorneys for Respondents
714 Main Street
P.O. Box 228
Boonton, New Jersey 07005
(201) 334-1900

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY FILED NOVEMBER 29, 1990

Civil Action No.
90-830 (MTB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NELSON FERNANDES,

Plaintiff,

VS.

ROCKAWAY TOWNSHIP TOWN COUNCIL and TOWNSHIP ENGINEER,

Defendants.

ORDER

This matter having been opened to the Court upon the motion of plaintiff Nelson Fernandes ("plaintiff") for summary judgment, *see* Fed.R.Civ.P. 56(c), and upon the cross-motion of defendants, Rockaway Township Town Council, *et al.* ("defendants") to dismiss the complaint for lack of subject matter jurisdiction, *see* Fed.R.Civ.P. 12 (b) (1), and the Court having considered the submissions of the parties both in support of and in opposition to the above motions without oral argument, pursuant to the provisions of Federal Rule of Civil Procedure 78; and

it appearing that plaintiff filed an amended complaint in this matter on July 19, 1990, pursuant to 42 U.S.C. § 1983[1]; and

the Court first addressing the cross-motion to dismiss for lack of subject matter jurisdiction[2]; and

it being the opinion of the Court that "a complaint should not be dismissed for failure to sate a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," *see Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Paolino v. Channel Home Centers,* 688 F.2d 721, 722 (3rd Cir. 1981); and

it being the opinion of the Court that "plaintiffs in civil rights cases are required to plead facts with specificity", *see Rotolo v. Borough of Charleroi,* 532 F.2d 920, 922 (3rd Cir. 1976);

---

1. 42 U.S.C. § 1983 provides, in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .".

2. Although defendants have brought their motion pursuant to Rule 12 (b) (1), Fed.R.Civ.P., (lack of subject matter jurisdiction), the motion is more properly considered as one brought under Rule 12 (b) (6), Fed.R.Civ.P., (failure to state a claim upon which relief may be granted). *See Chiplin Enterprises v. City of Lebanon,* 712 F.2d 1524, 1528-1529 (1st Cir. 1983). There is no doubt that plaintiff has properly invoked the jurisdiction of this Court on the face of his complaint, or that he has attempted to state a claim for the deprivation of his civil rights. Plaintiff's right to recovery thus depends upon whether or not he has stated a claim which is cognizable under the Constitution and laws of the United States, and not whether his claim is one over which this Court possesses subject matter jurisdiction. *See Chiplin,* 712 F.2d at 1528. Accordingly, I will treat the motion as one brought pursuant to Rule 12 (b) (6).

Kauffman v. Moss, 420 F.2d 1270, 1275-1276 (3rd Cir. 1970), *cert. denied*, 400 U.S. 846 (1970); *Negrich v. Hohn*, 379 F.2d 213 (3rd Cir. 1967); and

it being the opinion of the Court that the requirement that civil rights complaints be pled with specificity is designed to "protect[] state officials from a deluge of frivolous claims and [to] provid[e] state officials with sufficient notice of the claims asserted to enable preparation of responsive pleadings . . ."; *see Colburn v. Upper Darby Tp.*, 838 F.2d 663, 666 (3rd Cir. 1988); *see also Rotolo*, 532 F.2d at 922; and

it appearing that, in attempting to articulate, with specificity, the particular constitutional rights, privileges or immunities of which defendants have deprived him, plaintiff states, *inter alia*, that defendants have acted so as to deprive him of "property . . . of property rights and due process", *see* Complaint at p. 1; and

it appearing that, in support of this contention, plaintiff alleges, in the main, that he was permitted and/or fraudulently induced into purchasing certain lots in Rockaway Township without proper disclosure by the Town Council of sewer use restrictions which had been imposed on the property; *see* Amended Complaint at pp. 2-3; and

it being the opinion of the Court that, even considering the supplemental papers plaintiff has filed in support of his motion for summary judgment, plaintiff has failed to adequately state a claim for a violation of his federal constitutional rights[3];

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3. Notwithstanding the fact that plaintiff has already once amended his complaint, the specific Constitutional rights he seeks to vindicate remain unclear. While plaintiff references a state law governing the method of sale which public entities must follow when offering lands at public auction, *see* N.J.S.A. 40A:12-13,

(Cont'd)

Appendix A

IT IS on this 28th day of November, 1990

(Cont'd)
he nowhere alleges in that manner the failure to follow the provisions of his law, if failure there was, would also constitute a violation of his federal rights under the Constitution of the United States. Even assuming that plaintiff seeks to bring a procedural due process challenge under the Fourteenth Amendment of the Constitution, a claim which is not articulated with any specificity, I would have grave doubts as to the sufficiency of this claim *vis* a *vis* the facts as they now exist. *See, e.g., Creative Environments, Inc. v. Estabrook*, 680 F.2d 822, 832, n. 9 (1st Cir. 1982), *cert. denied*, 459 U.S. 989 (1982) ("Where a state has provided reasonable remedies to rectify a legal error by a local administrative body . . . current authority indicates that due process has been provided, and that section 1983 is not a means for litigating the correctness of the state or local administrative decision in a federal forum . . . [One's right to] property is not denied without due process simply because a local planning board rejects a proposed development for erroneous reasons or makes demands which arguably exceed its authority under the relevant state statutes."); *See also, Chiplin*, 712 F.2d at 1528 ("A mere bad faith refusal to follow state law in such local administrative matters simply does not amount to a deprivation of due process where the state courts are available to correct the error"). Thus, even assuming that plaintiff had properly and articulately set forth a procedural due process challenge, dismissal would be appropriate.

I also note that the same analysis would apply as to any "takings" challenge under the Fifth Amendment. Plaintiff has certainly not been deprived of all use of his property, *see, e.g., Bello v. Walker*, 840 F.2d 1124, 1131 (3rd Cir. 1988), and thus, even if articulately stated, this claim would be dismissed as well.

Finally, to the extent that plaintiff has alleged separate claims under state law, *see supra*, they are dismissed as well. *See, e.g., Lovell Mfg. v. Export-Import Bank of the U.S.*, 843 F.2d 725, 735 (3rd Cir. 1988) (dismissal of federal claims where no independent basis for jurisdiction exists).

While plaintiff is free to attempt to amend his complaint to comply with the specific pleading requirements regarding Section 1983 actions, *see Ross v. Meagan*, 638 F.2d 646, 650 (3rd Cir. 1981) (leave to amend shall be freely given), I would urge
(Cont'd)

Appendix A

ORDERED, that the amended complaint of plaintiff Nelson Fernandes is hereby dismissed without prejudice.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

(Cont'd)
plaintiff to consider airing his grievance within the courts of the State of New Jersey. If plaintiff has any claim at all, it would appear to arise exclusively under state law and, accordingly, it is in the state courts in which he should proceed in this non-diverse action. If plaintiff has any claim at all, it would appear to arise exclusively under state law and, accordingly, it is in the state courts in which he should proceed in this non-diverse action. If plaintiff feels he can still articulate a federal claim, the state court would be equally equipped to handle it, *see, e.g., Maine v. Thiboutot,* 448 U.S. 1 (1980), and he would thus avoid having to re-rile in state court in any event should it be determined at a later date by this Court that he has not, in fact, stated a viable federal claim, but only a state law claim. *See Lovell, supra.*

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW *JERSEY FILED SEPTEMBER 23, 1991*

Civil Action No.
90-830 (MTB)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NELSON FERNANDES,

Plaintiff,

VS.

THE TOWNSHIP OF ROCKAWAY, a Municipal Corporation of the State of New Jersey,

Defendant.

ORDER

This matter having come before the Court upon the motion of plaintiff Nelson Fernandes for leave to file an amended complaint out of time pursuant to Fed. R. Civ. P. 15(a); and the Court having considered the submissions of the parties both in support of and in opposition to the motion without oral argument pursuant to Fed. R. Civ. P. 78; and

it appearing that plaintiff initially filed a complaint with this Court on February 28, 1990 and subsequently filed an amended complaint on July 19, 1990; and

it appearing that this Court dismissed without *prejudice* plaintiff's amended complaint in an order dated November 28, 1990; *see Fernandes v. Township of Rockaway,* No. 90-830 (MTB) (D.N.J. November 28, 1990); and

it appearing that plaintiff filed a similar action in the Superior Court of New Jersey, Law Division, Morris County Docket Number MRS-L-5845-90, on December 4, 1990; and it appearing that the Superior Court of New Jersey, Hon. John J. Harper, J.S.C., by an order dated July 10, 1991, dismissed all but two counts of plaintiff's complaint, permitting plaintiff to litigate the remaining two counts and ordering that discovery continue; and

it being the opinion of the Court that leave to amend a complaint need not be given where justice does not so require; *see* Fed. R. Civ. P. 15(a); and

it being the opinion of the Court that, given the pendency of identical state court proceedings, justice does not require this Court to grant plaintiff leave to amend the complaint[1],

IT IS on this *23rd* day of *September,* 1991, hereby

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1. Of course, whether to grant leave to amend a complaint is committed to the sound discretion of the district court. *Foman v. Davis,* 371 U.S. 178, 182 (1962); *Coventry v. U.S. Steel Corp.,* 856 F.2d 514, 518 (3rd Cir. 1988). In this case, justice clearly does not require leave to amend. I find cases dealing with federal court abstention to be informative on this point.

A federal district court may decline to exercise its jurisdiction "where the controversy may be settled more expeditiously in state court." *Will v. Calvert Fire Ins. Co.,* 437 U.S. 655, 662-63 (1978) (citing *Brillhart v. Excess Ins. Co.,* 316 U.S. 491, 494 (1942)). The question of whether to defer to state court proceedings is within the discretion of the district court. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 19 (1983).

(Cont'd)

Appendix B

ORDERED, that leave to amend plaintiff's complaint is hereby denied.

s/ Maryanne Trump Barry
MARYANNE TRUMP BARRY
U.S.D.J.

(Cont'd)

The Supreme Court recognized in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 818 (1976) the propriety of dismissing a federal action due to the existence of pending state litigation in the name of "wise judicial administration." *Id.* The Court in *Colorado River* enunciated several factors that would support such a decision. *Id.* These factors are to be applied pragmatically and flexibly, based on the realities of the case at hand. *Moses H. Cone*, 460 U.S. at 21.

First, a district court may consider the advantages of avoiding piecemeal litigation. *Colorado River*, 424 U.S. at 818. Clearly this factor weighs in favor of denying the motion now before me. All but two of plaintiff's claims have been adjudicated in state court, and the state court has ordered that discovery continue on the two remaining claims. To recommence proceedings on these two very same claims in federal court would be to needlessly bifurcate litigation which is more efficiently handled in one forum.

Second, a district court may look to the "priority" of the federal and state actions. The Supreme Court's decision in *Moses H. Cone* clarified that priority between forums is not merely a mechanical inquiry into which action was filed first. *Moses H. Cone*, 460 U.S. at 21. Rather, priority contemplates a comparison of how much progress has been made in each action. *Id.* Once again, the state court's substantial progress in resolving claims identical to those brought before this Court in the amended complaint counsels against granting plaintiff leave to amend.

Finally, I note that state courts have independent jurisdiction over § 1983 claims. *See, e.g., Maine v. Thiboutot*, 448 U.S. 1 (1980). Thus, plaintiff's § 1983 claims can be adequately addressed in the ongoing state court litigation. *See Medema v. Medema Builders, Inc.*, 854 F.2d 20, 213 (7th Cir. 1988) (district courts should not decline to exercise jurisdiction in areas of exclusive federal jurisdiction).